A/CONF.117/16 (Vol. II)

UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS

Vienna, 1 March–8 April 1983

OFFICIAL RECORDS

Volume II

Summary records of the plenary meetings
and of the meetings of the Committee of the Whole

UNITED NATIONS

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New York, 1995

INTRODUCTORY NOTE

The *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts* consist of two volumes.

Volume I contains the summary records of the plenary meetings and of the meetings of the Committee of the Whole. Volume II contains the documents, which include the Final Act, the resolutions adopted by the Conference and the Convention itself; it also contains a complete index of the documents relevant to the proceedings of the Conference.

* * *

The summary records of the plenary meetings and of the meetings of the Committee of the Whole contained in volume I were originally circulated in mimeographed form, as documents A/CONF.117/SR.1 to SR.10 and A/CONF.117/C.1/SR.1 to SR.44 respectively. They include the corrections to the provisional summary records that were requested by delegations and such drafting and editorial changes as were considered necessary.

* * *

The symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

* * *

The word "*Yearbook*" followed by suspension points and the year (e.g., *Yearbook . . . 1970*) indicates a reference to the *Yearbook of the International Law Commission*.

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PROPOSALS, REPORTS AND OTHER DOCUMENTS

A. REPORT OF THE CREDENTIALS COMMITTEE

Document A/CONF.117/12*

CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE

[*Original: English*]
[*6 April 1983*]

1. At its 3rd plenary meeting, held on Friday, 4 March 1983, the Conference, in accordance with rule 4 of the rules of procedure, appointed a Credentials Committee consisting of the following States: Belgium, Brazil, Japan, Kenya, Kuwait, Nicaragua, Senegal, United States of America and Union of Soviet Socialist Republics.

2. The Credentials Committee met on 6 April 1983.

3. Mr. Geraldo Eulalio do Nascimento e Silva (Brazil) was unanimously elected Chairman.

4. The Committee had before it a memorandum dated 5 April 1983, from the Representative of the Secretary-General to the Conference, the Legal Counsel, on the status of the credentials of the representatives to the Conference. The memorandum stated that, as of 5 April 1983, the Secretariat of the Conference had received credentials as indicated below:

(*a*) Credentials issued by the Head of State or Government or by the Minister for Foreign Affairs as provided for in rule 3 of the rules of procedure of the Conference, had been received in respect of representatives of the following 68 States: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Byelorussian SSR, Canada, Chile, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic Yemen, Denmark, Egypt, Finland, France, Gabon, German Democratic Republic, Germany, Federal Republic of, Greece, Hungary, India, Indonesia, Iran, Islamic Republic of; Iraq, Israel, Ivory Coast, Japan, Jordan, Kenya, Kuwait, Lebanon, Libyan Arab Jamahiriya, Luxembourg, Mexico, Morocco, Netherlands, Nicaragua, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Romania, San Marino, Senegal, Spain, Suriname, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian SSR, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Viet Nam and Yugoslavia.

(*b*) As to Namibia represented by the United Nations Council for Namibia, and invited to the Conference pursuant to paragraph 2(*b*) of General Assembly resolution 37/11 of 15 November 1982, four representatives were accredited, respectively, by a note verbale from the Acting President of the United Nations Council for Namibia, by a cable from the President of the United Nations Council for Namibia, and by a cable from the Secretary of the United Nations Council for Namibia.

(*c*) Credentials in the form of a cable from the Head of State or Government or Minister for Foreign Affairs had been received in respect of representatives of four States, namely: Democratic People's Republic of Korea, Ecuador, Mali and Syrian Arab Republic.

(*d*) The Secretariat further had received credentials in the form of letters, notes verbales or cables emanating from a foreign ministry, a permanent representative, an ambassador, a minister other than the foreign minister or from a permanent mission or embassy of the State concerned in respect of representatives of the following 16 States: Guatemala, Holy See, Honduras, Ireland, Italy, Malaysia, Mauritania, Nigeria, Panama, Peru, Qatar, Saudi Arabia, Seychelles, Uruguay, Yemen and Zaire.

(*e*) As of 5 April 1983, no credentials had been received from the representatives of three States participating in the Conference, namely: Congo, Mozambique and Oman.

5. The Chairman noted that the memorandum from the representative of the Secretary-General to the Conference had been drawn up in a manner permitting its text to be incorporated in the report of the Committee.

6. On the proposal of the Chairman the Committee unanimously adopted the following resolution:

The Credentials Committee,

Having examined the credentials of the representatives to the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, referred to in paragraph 4 of its report,

1. *Accepts* the credentials referred to in paragraph 4(*a*) of its report,

2. *Accepts provisionally* the communications relating to the representatives of the 20 States referred to in paragraph 4(*c*) and (*d*) of its report pending the receipt of credentials complying with rule 3 of the rules of procedure,

3. *Recommends* that the representatives of the three States referred to in paragraph 4(*e*) of its report should continue to participate provisionally in accordance with rule 5 of the rules of procedure, pending the receipt of credentials complying with rule 3.

* Incorporating document A/CONF.117/12/Corr.1 of 7 April 1983.

7. The Committee further decided to authorize the Chairman with the assistance of the Secretary to formulate the report of the Committee and to present the report to the Conference after consultation with interested members of the Committee. The Chairman also was authorized to supplement the report of the Committee so as to reflect any additional registration credentials and communications received by the Secretariat subsequent to the Committee's meeting.

Recommendation of the Credentials Committee

8. Finally, the Committee, on the proposal of the Chairman, decided to recommend the following draft resolution for adoption by the Conference:

Credentials of representatives to the United Nations Conference on Succession of States

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having examined the report of the Credentials Committee,

Approves the report of the Credentials Committee.

[Adopted by the Conference at its 10th plenary meeting.]

B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS THIRTY-THIRD SESSION

Document A/CONF.117/4

[Section D only*]

Note. This text is reproduced as it appears in section D of chapter II of the report of the International Law Commission on the work of its thirty-third session**

PART I
GENERAL PROVISIONS

Commentary

Part I, following the model of the 1969 Vienna Convention[76] and the 1978 Vienna Convention,[77] contains certain general provisions which relate to the present draft articles as a whole. Its title reproduces that of Part I of the 1978 Vienna Convention. Also, in order to maintain structural conformity with the corresponding parts of those Conventions, the order of articles 1 to 3 follows that of the articles dealing with the same subject-matter in those conventions.

Article 1. Scope of the present articles

The present articles apply to the effects of a succession of States in respect of State property, archives and debts.

Commentary

(1) This article corresponds to article 1 of the 1978 Vienna Convention. Its purpose is to limit the scope of the present draft articles in two important respects.

(2) First, article 1 takes account of the decision by the General Assembly that the topic under consideration should be entitled: "Succession of States in respect of matters other than treaties".[78] In incorporating the words "of States" in article 1, the Commission intended to exclude from the field of application of the present draft articles the succession of Governments and the succession of subjects of international law other than States, an exclusion which also results from article 2, subparagraph 1(*a*). The Commission also intended to limit the field of application of the draft articles to certain "matters other than treaties".

(3) In view of General Assembly resolution 33/139 of 19 December 1978, recommending that the Commission should aim at completing at its thirty-first session the first reading of "the draft articles on succession of States in respect of State property and State debts", the Commission considered at that session the question of reviewing the words "matters other than treaties", which appeared both in the title of the draft articles and in the text of article 1, to reflect that further limitation in scope. It decided, however, to do so at its second reading of the draft, so as to take into account observations of Governments. The Commission nevertheless decided, at the thirty-first session, to change the article "*les*" before "*matières*" to "*des*" in the French version of the title of the topic, and consequently of the title of the draft articles, as well as in the text of article 1, in order to align it with the other language versions. As explained above,[79] at its present session the Commission decided, on the basis of governmental observations, to entitle the final draft: "Draft articles on succession of States in respect of State property, archives and debts". The present text of article 1 is a reflection of that decision. Although the word "State" appears only once, for reasons of style, it must be understood that it is intended to qualify all the three matters described.

(4) The second limitation is that of the field of application of the draft articles to the *effects* of succession of States in respect of State property, archives and debts. Article 2, subparagraph 1(*a*), specifies that "*succession of States* means the replacement of one State by another in the responsibility for the international relations of territory". In using the term "*effects*" in article 1, the Commission wished to indicate that the provisions included in the draft concern not the replacement itself but its legal effects, i.e., the rights and obligations deriving from it.

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* For sections A to C, see mimeographed version of document A/CONF.117/4. For references to paragraphs 13 to 87 and footnotes 1 to 75 in this text, see those sections.

** *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 10* (A/36/10 and Corr.1), chap. II, sect. D. A typeset version of the report of the Commission is included in the *Yearbook of the International Law Commission 1981*, vol. II (Part Two) (United Nations publication, Sales No. E.82.V.4 (Part II)).

[76] See footnote 63 above.

[77] See footnote 16 above.

[78] See para. 30 above.

[79] See paras. 67 and 68 above.

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*d*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*e*) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(*f*) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended to state the meaning with which terms are used in the draft articles.

(2) *Paragraph 1, subparagraph* (a) of article 2 reproduces the definition of the term "succession of States" contained in article 2, subparagraph 1(*b*), of the 1978 Vienna Convention.

(3) In its report on its twenty-sixth session (1974), the Commission specified, in the commentary to article 2 of the draft articles on succession of States in respect of treaties, on the basis of which article 2 of the 1978 Vienna Convention was adopted, that the definition of succession of States given in that article referred exclusively to *the fact of the replacement* of one State by another "in the responsibility for the international relations of territory", leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. It went on to say that the rights and obligations deriving from a succession of States were those specifically provided for in those draft articles. The Commission noted, further, that it had considered that the expression "in the responsibility for the international relations of territory" was preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty-making competence in respect of territory", because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case, independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The Commission specified that the word "responsibility" should be read in conjunction with the words "for the international realtions of territory" and was not intended to convey any notion of "State responsibility", a topic being studied separately by the Commission.[80]

(4) The Commission decided to include in the present draft articles the definition of "succession of States" contained in the 1978 Vienna Convention, considering it desirable that, where the Convention and the draft articles refer to one and the same phenomenon, they should, as far as possible, give identical definitions of it. Furthermore, article 1 supplements the definition of "succession of States" by specifying that the draft articles apply, not to the replacement of one State by another in the responsibility for the international relations of territory, but to the effects of that replacement.

(5) *Subparagraphs* (b), (c) *and* (d) of *paragraph 1* reproduce the terms of paragraph 1, subparagraphs (*c*), (*d*) and (*e*) of article 2 of the 1978 Vienna Convention. The meaning that they attribute to the terms "predecessor State", "successor State" and "date of the succession of States" derives, in each case, from the meaning given to the term "succession of States" in paragraph 1(*a*), and would not seem to call for any comment.

(6) *Subparagraph 1*(e) reproduces the text of article 2, subparagraph 1(*f*), of the 1978 Vienna Convention, which was based on article 2, subparagraph 1(*f*), of the draft articles adopted by the Commission in 1974. The part of the commentary to that article relating to the definition is equally applicable in the present case. As the Commission stated:

> . . . the definition given in paragraph 1(*f*) includes any case of emergence to independence of any former dependent territories, whatever its particular type may be [colonies, trusteeships, mandates, protectorates, etc.]. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case . . . of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent States" has been chosen instead of the shorter expression "new State".[81]

(7) The expression "third State" does not appear in article 2 of the 1978 Vienna Convention. This was because the expression "third State" was not available for use in that Convention, since it had already been made a technical term in the 1969 Vienna Convention to denote "a State not a party to the treaty". As regards the draft articles on succession of States in respect of State property, archives and debts, however, the Commission took the view that the expression "third State" was the simplest and clearest way of designating any State other than the predecessor State or the successor State.[82]

(8) Lastly, *paragraph 2* corresponds to paragraph 2 of article 2 of the 1969 Vienna Convention as well as of the

[80] *Yearbook . . . 1974*, vol. II (Part One), p. 175-176, document A/9610/Rev.1, chap. II, sect. D, paras. (3) and (4) of the commentary to art. 2.

[81] *Ibid.*, p. 176, para. (8) of the commentary.

[82] See *Yearbook . . . 1975*, vol. II, p. 114, document A/10010/Rev.1, chap. III, sect. B, 2, commentary to para. (*e*) of art. 3.

1978 Vienna Convention, and is designed to safeguard in matters of terminology the position of States in regard to their internal law and usages.

Article 3. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) This provision reproduces *mutatis mutandis* the terms of article 6 of the 1978 Vienna Convention, which is based on article 6 of the draft articles on the topic prepared by the Commission.

(2) As it stated in the report on its twenty-fourth session, the Commission, in preparing draft articles for the codification of general international law, normally assumes that these articles are to apply to facts occurring or situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Thus, when the Commission, at its twenty-fourth session, was preparing its draft articles on succession of States in respect of treaties, several members considered that it was unnecessary to specify in the draft that its provisions would apply only to the effects of a succession of States occurring in conformity with international law.[83]

(3) Other members, however, pointed out that when matters not in conformity with international law called for specific treatment the Commission had expressly so noted. They cited as examples the provisions of the draft articles on the law of treaties concerning treaties procured by coercion, treaties which conflict with norms of *jus cogens*, and various situations which might imply a breach of an international obligation. Accordingly, those members were of the opinion that, particularly in regard to transfers of territory, it should be expressly stipulated that only transfers occurring in conformity with international law would fall within the concept of "succession of States" for the purposes of the draft articles being prepared. The Commission adopted that view. However, in its report it noted that:

> Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law.[84]

(4) At its twenty-fifth session, the Commission decided to include in what was then the introduction to the draft articles on succession of States in respect of matters other than treaties a provision identical with that of article 6 of the draft articles on succession of States in respect of treaties. It took the view that there was now an important argument to be added to those which had been put forward at the twenty-fourth session in favour of article 6: the absence from the present draft articles of the provision contained in article 6 of the draft articles on succession of States in respect of treaties might give rise to doubts as to the applicability to the present draft of the general presumption that the texts prepared by the Commission relate to facts occurring or situations established in conformity with international law.[85]

Article 4. Temporal application of the present articles

1. Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the articles apply only in respect of a succession of States which has occurred after the entry into force of the articles except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present articles or at any time thereafter, make a declaration that it will apply the provisions of the articles in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other contracting State or State Party to the articles which makes a declaration accepting the declaration of the successor State. Upon the entry into force of the articles as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the articles shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present articles make a declaration that it will apply the provisions of the articles provisionally in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present articles of the communication to him of that notification and of its terms.

Commentary

(1) The Commission, having recommended to the General Assembly that the present draft articles be studied by a conference of plenipotentiaries with a view to the conclusion of a convention on the subject,[86] rec-

[83] *Yearbook . . . 1972*, vol. II, p. 236, document A/8710/Rev.1, chap. II, sect. C, paras. (1) and (2) of the commentary to art. 6.

[84] *Ibid.*, para. (2) of the commentary.

[85] *Yearbook . . . 1973*, vol. II, pp. 203-204, document A/9010/Rev.1, chap. III, sect. B, para. (4) of the commentary to art. 2.

[86] See para. 86 and footnote 75 above.

ognized that participation by successor States in the future convention would involve problems relating to the method of giving consent to be bound by the convention expressed by the successor State, and the retroactive effect of such consent. In fact, under the general law of treaties, a convention is not binding upon a State unless and until it is a party to the convention. Moreover, under a general rule now codified in article 28 of the 1969 Vienna Convention, the provisions of a treaty, in the absence of a contrary intention "do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party". Since a succession of States in most cases brings into being a new State, a convention on the law of succession in respect of State property, archives and debts would *ex hypothesi* not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new State until the latter had become a party.

(2) At its present session the Commission, conscious that in the absence of a provision in these draft articles concerning their temporal application, article 28 of the 1969 Vienna Convention would apply, concluded that it was necessary to include the present article 4 in order to avoid the problems referred to in the preceding paragraph. As in the case of article 3, this article reproduces, *mutatis mutandis*, the corresponding provision (art. 7) of the 1978 Vienna Convention, which is intended to solve in the context of the law of succession of States in respect of treaties as codified in that convention problems similar to those which arise in the case of the present draft, as explained above.

(3) Article 7 of the 1978 Vienna Convention was adopted by the United Nations Conference on Succession of States in Respect of Treaties after long and careful consideration at both the first and resumed sessions of the Conference, with the help of an Informal Consultations Group set up to consider, *inter alia*, its subject-matter.[87] Paragraph 1 of article 7 reproduces without change the text of the only paragraph constituting draft article 7 of the final draft on succession of States in respect of treaties adopted by the Commission in 1974.[88] Paragraphs 2 to 4 of article 7 of the 1978 Vienna Convention were elaborated by the Conference as a mechanism intended to enable successor States to apply the provisions of the Convention, or to apply them provisionally, in respect of their own succession which had occurred before the entry into force of the Convention. Article 4 aims at achieving similar results in the case of a future convention embodying rules applicable to a succession of States in respect of State property, archives and debts.

(4) In its commentary to draft article 7 of the final draft on succession of States in respect of treaties adopted in 1974, the Commission stated, *inter alia*, the following:

> Article 7 is modelled on article 4 of the [1969] Vienna Convention but is drafted having regard to the provisions on the non-retroactivity of treaties in article 28 of that Convention. The article has two parts. The first, corresponding to the first part of article 4 of the Vienna Convention, is a saving clause which makes clear that the non-retroactivity of the present articles will be without prejudice to the application of any of the rules set forth in the articles to which the effects of a succession of States would be subject under international law independently of the articles. The second part limits the application of the present articles to cases of succession of States which occur after the entry into force of the articles except as may be otherwise agreed. The second part speaks only of "a succession of States", because it is possible that the effects of a succession of States which occurred before the entry into force of the articles might continue after their entry into force and this possibility might cause confusion in the application of the article. The expression "entry into force" refers to the general entry into force of the articles rather than the entry into force for the individual State, because a successor State could not become a party to a convention embodying the articles until after the date of succession of States. Accordingly, a provision which provided for non-retroactivity with respect to "any act or fact . . . which took place before the *date of the entry into force of the treaty with respect to that part*,"[89] as in article 28 of the 1969 Vienna Convention, would, if read literally, prevent the application of the articles to any successor State on the basis of its participation in the convention. The words "except as may be otherwise agreed" are included to provide a measure of flexibility and reflect the sense of the introductory words to article 28 of the [1969] Vienna Convention.[90]

The foregoing passage, which is applicable to paragraph 1 of article 4 of the present draft, is to be read, for the purposes of this draft, keeping in mind the provisions contained in paragraphs 2 to 4 of the article.

Article 5. Succession in respect of other matters

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present articles.

Commentary

In view of the fact that the present draft articles do not deal with succession of States in respect of all matters other than treaties but are, rather, limited in scope to State property, archives and debts, the Commission, in second reading, deemed it appropriate to include this safeguard clause relating to the effects of a succession of States in respect of matters other than the three to which the draft applies. The wording of article 5 is modelled on that of article 14 of the 1978 Vienna Convention.

Article 6. Rights and obligations of natural or juridical persons

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

Commentary

As is explained below in the commentary to article 31, the Commission, at its present session, decided

[87] For the summary records of the plenary meetings and of the meetings of the Committee of the Whole held during the first (1977) and resumed (1978) sessions of the Conference, see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vols. I and II respectively (United Nations publications, Sales Nos. E.78.V.8 and E.79.V.9).

[88] *Yearbook . . . 1974*, vol. II (Part One), pp. 181-182, document A/9610/Rev.1.

[89] *Ibid.*, p. 182, para. (3) of the commentary to art. 7.

not to include in the definition of State debt a reference to any financial obligation chargeable to a State other than those owed to another State, an international organization or any other subject of international law. Other provisions, such as article 12, might be misunderstood as implying some prejudice to the rights of natural or juridical persons. In these circumstances the Commission found it especially appropriate to insert in the draft the safeguard clause contained in article 6. It is intended to avoid any implication that the effects of a succession of States in respect of State property, archives and debts, for which the present articles provide, could in any respect prejudice any question relating to the rights and obligations of individuals, whether natural or juridical persons. The article is cast in general form and has therefore been included in the present Part I, containing the "General provisions" applicable to the draft as a whole.

PART II
STATE PROPERTY

SECTION 1. INTRODUCTION

Article 7. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State property.

Commentary

The purpose of this provision is simply to make it clear that the articles in Part II deal with only one of the three "matters other than treaties" mentioned in article 1, namely, State property.

Article 8. State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Commentary

(1) The purpose of article 8 is not to settle what is to become of the State property of the predecessor State, but merely to establish a criterion for determining such property.

(2) There are in practice quite a number of examples of treaty provisions which determine, in connection with a succession of States, the State property of the predecessor State, sometimes in detail. They include article 10 of the Treaty of Utrecht between France and Great Britain of 11 April 1713;[90] article II of the Treaty of 30 April 1803 between France and the United States of America for the cession of Louisiana;[91] article 2 of the Treaty of 9 January 1895 by which King Leopold II ceded the Congo to the Belgian State;[92] article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between China and Japan,[93] and article I of the Convention of Retrocession of 8 November 1895 between the same States;[94] article VIII of the Treaty of Peace of 10 December 1898 between Spain and the United States of America,[95] and the annexes to the Treaty of 16 August 1960 concerning the establishment of the Republic of Cyprus.[96]

(3) An exact specification of the property to be transferred by the predecessor State to the successor State in two particular cases of succession of States is also to be found in two resolutions adopted by the General Assembly in pursuance of the provisions of the Treaty of Peace with Italy of 10 February 1947.[97] The first of these, resolution 388 (V), was adopted on 15 December 1950, with the title "Economic and financial provisions relating to Libya". The second, resolution 530 (VI), was adopted on 29 January 1952, with the title "Economic and financial provisions relating to Eritrea".

(4) No generally applicable criteria, however, can be deduced from the treaty provisions mentioned above, the content of which varied according to the circumstances of the case, or from the two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations. Moreover, as the Franco-Italian Conciliation Commission stated in an award of 26 September 1964, "customary international law has not established any autonomous criterion for determining what constitutes State property".[98]

(5) Up to the moment when the succession of States takes place, it is the internal law of the predecessor State which governs that State's property and determines its status as State property. The successor State receives it as it is into its own juridical order. As a sovereign State, it is free, within the limits of general international law, to change its status, but any decision it takes in that connection is necessarily subsequent to the succession of States and derives from its competence as a State and not from its capacity as the successor State. Such a decision is outside the scope of State succession.

(6) The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute.

(7) For example, in its Judgment of 15 December 1933 in the *Péter Pázmány University* case, the Permanent Court of International Justice took the view that it had

[90] *British and Foreign State Papers, 1846-1847*, vol. XXXV (London, Harrison, 1860), p. 815.

[91] W. M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., 1910), vol. I, p. 509.

[92] *British and Foreign State Papers, 1897-1898*, vol. XC (London, H.M. Stationery Office, 1901), p. 1281.

[93] *British and Foreign State Papers, 1894-1895*, vol. LXXXVII (London, H.M. Stationery Office, 1900), p. 799.

[94] *Ibid.*, p. 1195.

[95] Malloy, *op. cit.*, p. 1693.

[96] United Nations, *Treaty Series*, vol. 382, p. 8.

[97] *Ibid.*, vol. 49, p. 3.

[98] Award in "Dispute regarding property belonging to the Order of St. Maurice and St. Lazarus" (*Annuaire français de droit international, 1965* (Paris), vol. XI, p. 323).

"no need to rely upon"[99] the interpretation of the law of the predecessor State in order to decide whether the property in dispute was public property. It is true that the matter was governed by various provisions of the Treaty of Trianon (4 June 1920),[100] which limited the Court's freedom of judgement. In another case, in which Italy was the predecessor State, the United Nations Tribunal in Libya ruled on 27 June 1955 that in deciding whether an institution was public or private, the Tribunal was not bound by Italian law and judicial decisions.[101] Here again, the matter was governed by special provisions—in this case those of resolution 388 (V), already mentioned (para. (3) above), which limited the Court's freedom of judgement.

(8) The Commission nevertheless considers that the most appropriate way of defining "State property" for the purposes of part II of the present draft articles is to refer the matter to the internal law of the predecessor State.

(9) The opening words of article 8 emphasize that the rule it states applies only to the provisions of part II of the present draft and that, as usual in such cases, the Commission did not in any way intend to put forward a general definition.

(10) The Commission wishes to stress that the expression "property, rights and interests" in article 8 refers only to rights and interests of a legal nature. This expression is to be found in many treaty provisions, such as article 297 of the Treaty of Versailles (28 June 1919),[102] article 249 of the Treaty of Saint-Germain-en-Laye (10 September 1919),[103] article 177 of the Treaty of Neuilly-sur-Seine (27 November 1919),[104] article 232 of the Treaty of Trianon[105] and article 79 of the Treaty of Peace with Italy.[106]

(11) In article 8, the expression "internal law of the predecessor State" refers to rules of the legal order of the predecessor State which are applicable to State property. For States whose legislation is not unified, these rules include, in particular, those which determine the specific law of the predecessor State—national, federal, metropolitan or territorial—that applies to each piece of its State property.

Article 9. Effects of the passing of State property

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part.

Commentary

(1) Article 9 makes it clear that a succession of States has a dual juridical effect on the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter. It entails, on the one hand, the extinction of the rights of the predecessor State to the property in question and, on the other hand and simultaneously, the arising of the rights of the successor State to that property. The purpose of article 9 is not to determine what State property passes to the successor State. Such determination will be done "in accordance with the provisions of the articles in the present Part", and more specifically, of articles 12 to 17.

(2) Article 9 gives expression in a single provision to a consistent practice, and reflects the endeavour to translate, by a variety of formulae, the rule that a succession of States entails the extinction of the rights of the predecessor State and the arising of those of the successor State to State property passing to the successor State. The terminology used for this purpose has varied according to time and place. One of the first notions found in peace treaties is that of the renunciation by the predecessor State of all rights over the ceded territories, including those relating to State property. This notion already appears in the Treaty of the Pyrenees of 1659,[107] and found expression again in 1923 in the Treaty of Lausanne[108] and in 1951 in the Treaty of Peace with Japan.[109] The Treaty of Versailles expresses a similar idea concerning State property in a clause which stipulates that "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States".[110] A similar clause is found in the treaties of Saint-Germain-en-Laye,[111] Neuilly-sur-Seine[112] and Trianon.[113] The notion of cession is also frequently used in several treaties.[114] Despite the variety of formulae, the large majority of treaties relating to transfers of territory contain a consistent rule, namely, that of the extinction and simultaneous arising of rights to State property.

(3) For article 9, the Commission adopted the notion of the "passing" of State property, rather than of the "transfer" of such property, because it considered that the notion of transfer was inconsistent with the juridical nature of the effects of a succession of States on the rights of the two States in question to State property. On the one hand, a transfer often presupposes an act of will on the part of the transferor. As indicated by the word "entails" in the text of article 9, however, the

[99] *P.C.I.J.*, Series A/B, No. 61, p. 236.
[100] *British and Foreign State Papers, 1920*, vol. CXIII (London, H.M. Stationery Office, 1923), p. 486.
[101] United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 390.
[102] *British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), pp. 146-149.
[103] *Ibid.*, pp. 434-437.
[104] *Ibid.*, pp. 839-842.
[105] *Ibid., 1920*, vol. CXIII *(op. cit.)*, pp. 585 *et seq.*
[106] United Nations, *Treaty Series*, vol. 49, p. 163.
[107] Art. XLI (English, trans. in F. L. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House and McGraw Hill, 1967), vol. I, pp. 69-70).
[108] See in particular arts. 15, 16 and 17 (League of Nations, *Treaty Series*, vol. XXVIII, p. 23).
[109] Art. 2 (United Nations, *Treaty Series*, vol. 136, pp. 48 and 50).
[110] Art. 256 (*British and Foreign State Papers, 1919*, vol. CXII *(op. cit.)*, p. 125).
[111] Art. 208 (*ibid.*, pp. 412-414).
[112] Art. 142 (*ibid.*, pp. 821-822).
[113] Art. 191 (*ibid., 1920*, vol. CXIII *(op. cit.)*, pp. 564-565).
[114] See, for example, art. 1 of the Convention of 4 August 1916 between the United States of America and Denmark concerning the cession of the Danish West Indies (in *Supplement to the American Journal of International Law* (New York, Oxford University Press), vol. 11 (1917), pp. 61-62, and art. V of the Treaty of 2 February 1951 concerning the cession to India of the Free Town of Chandernagore (United Nations, *Treaty Series*, vol. 203, p. 158)).

extinction of the rights of the predecessor State and the arising of the rights of the successor State take place as of right. On the other hand, a transfer implies a certain continuity, whereas a simultaneous extinction and arising imply a break in continuity. The Commission nevertheless wishes to make two comments on this latter point.

(4) In the first place, the successor State may create a certain element of continuity by maintaining provisionally in force the rules of the law of the predecessor State relating to the régime of State property. Such rules are certainly no longer applied on behalf of the predecessor State, but rather on behalf of the successor State, which has received them into its own law by a decision taken in its capacity as a sovereign State. Although, however, at the moment of succession, it is another juridical order that is in question, the material content of the rules remains the same. Consequently, in the case envisaged, the effect of the succession of States is essentially to change the entitlement to the rights to the State property.

(5) In the second place, the legal passing of the State property of the predecessor State to the successor State is often, in practice, followed by a material transfer of such property between the said States, accompanied by the drawing-up of inventories, certificates of delivery and other documents.

Article 10. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

Commentary

(1) Article 10 contains a residuary provision specifying that the date of the passing of State property is that of the succession of States. It should be read together with article 2, subparagraph 1(*d*), which states that " 'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

(2) The residuary character of the provision in article 10 is brought out by the subsidiary clause with which the article begins: "Unless otherwise agreed or decided". It follows from that clause that the date of the passing of State property may be fixed either by agreement or by a decision.

(3) In fact, it sometimes occurs in practice that the States concerned agree to choose a date for the passing of State property other than that of the succession of States. It is that situation which is referred to by the term "agreed" in the above-mentioned opening clause. Some members of the Commission suggested that the words "between the predecessor State and the successor State" should be added. Others, however, opposed that suggestion on the grounds that for State property situated in the territory of a third State the date of passing might be laid down by a tripartite agreement concluded between the predecessor State, the successor State and the third State.

(4) There have also been cases where an international court has ruled on the question what was the date of the passing of certain State property from the predecessor State to the successor State.[115] The Commission therefore added the words "or decided" after the word "agreed" at the beginning of article 10. However, the Commission did not intend to specify from whom a decision might come.

Article 11. Passing of State property without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

Commentary

(1) Article 11 comprises a main provision and two subsidiary clauses. The main provision lays down the rule that the passing of State property from the predecessor State to the successor State in accordance with the provisions of the articles in the present Part shall take place without compensation. It constitutes a necessary complement to article 9, but like that article—and for the same reasons[116]—it is not intended to determine what State property passes to the successor State.

(2) With some exceptions,[117] practice confirms the rule set forth in the main provision of article 11. In many treaties concerning the transfer of territories, acceptance of this rule is implied by the fact that no obligation is imposed on the successor State to pay compensation for the cession by the predecessor State of public property, including State property. Other treaties state the rule expressly, stipulating that such cession shall be without compensation. These treaties contain phrases such as "without compensation",[118] "in full Right",[119]

[115] See for example Judgment No. 7 handed down on 25 May 1926 by the *P.C.I.J.* in the case *Certain German interests in Polish Upper Silesia* (*P.C.I.J.*, Series A, No. 7), and its Advisory Opinion of 10 September 1923 on the case *German Settlers in Poland* (*ibid.*, Series B, No. 6, pp. 6-43).

[116] See above, para. (1) of the commentary to art. 9.

[117] These exceptions are to be found, *inter alia*, in four of the peace treaties concluded after the First World War. See art. 256 of the Treaty of Versailles, art. 208 of the Treaty of Saint-Germain-en-Laye, art. 142, of the Treaty of Neuilly-sur-Seine, and art. 191 of the Treaty of Trianon (for references, see footnotes 110-113 above). Under the terms of these treaties, the value of the State property ceded by the predecessor States to the successor States was deducted from the amount of the reparations due by the former to the latter. It should, however, be noted that in the case of some State property, the treaties in question provided for transfer without any *quid pro quo*. Thus, art. 56 of the Treaty of Versailles specified that "France shall enter into possession of all property and estate within the territories referred to in Article 51, which belongs to the German Empire or German States [i.e. in Alsace-Lorraine], without any payment or credit on this account to any of the States ceding the territories." (*British and Foreign State Papers, 1919*, vol. CXII (*op. cit.*), p. 43).

[118] Art. III, para. 4 of the Agreement between the United States of America and Japan concerning the Amami Islands, signed at Tokyo on 24 December 1953 (United Nations, *Treaty Series*, vol. 222, p. 195).

[119] Art. X of the Treaty of Utrecht of 11 April 1713 concerning the cession of the Bay and Straits of Hudson by France to Great Britain (Israel, *op. cit.*, p. 207).

"without payment" ("*sans paiement*"[120] or "*gratuitement*"[121]).

(3) The first subsidiary clause of article 11 ("Subject to the provisions of the articles in the present Part") is intended to reserve the effects of other provisions in part II. One notable example of such provisions is that of article 12, regarding the absence of effect of a succession of States on the property of a third State.

(4) The purpose of the second subsidiary clause of article 11 ("unless otherwise agreed or decided") is to provide expressly for the possibility of derogating from the rule in this article. It is identical with the clause in article 10 on which the Commission has already commented.[122]

Article 12. Absence of effect of a succession of States on the property of a third State

A succession of State shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Commentary

(1) The rule formulated in article 12 stems from the fact that a succession of States, that is, the replacement of one State by another in the responsibility for the international relations of territory, can have no legal effect with respect to the property of a third State. At the outset, the Commission wishes to point out that the article has been placed in part II of the draft, which is concerned exclusively with succession with respect to State property. Consequently, no argument *a contrario* can be drawn from the absence from article 12 of any reference to private property, rights and interests.

(2) As emphasized by the words "as such" appearing after the words "a succession of States shall not", article 12 deals solely with succession of States. It in no way prejudices any measures that the successor State, as a sovereign State, might adopt subsequently to the succession of States with respect to the property of a third State, in conformity with the rules of other branches of international law.

(3) The words "property, rights and interests" have been borrowed from article 8, where they form part of the definition of the term "State property". In article 12 they are followed by the qualifying clause "which, at the date of the succession of States, are situated in the territory of the predecessor State". The Commission regarded it as obvious that a succession of States could have no effect on the property, rights and interests of a third State situated outside the territory affected by the succession, and that the scope of the present article should therefore be limited to such territory.

(4) The words "according to the internal law of the predecessor State" are also borrowed from article 8. The Commission wishes to refer to observations previously expressed in this connection.[123]

(5) Certain members of the Commission considered this article unnecessary.

SECTION 2. PROVISIONS CONCERNING SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Commentary

(1) In section 1 of the present part, the draft articles dealt with various questions relating to succession of States in respect of State property applicable generally to all categories of succession. Articles 13 to 17 comprise section 2, and deal with the question of the passing of State property from the predecessor State to the successor State separately for each category of succession. This method was deemed to be the most appropriate for section 2 of part II of the draft, as it was for section 2 in parts III and IV as well, in view of the obvious differences existing between various categories of succession, owing to the political environment in each of the cases where there is a change of sovereignty over or a change in the responsibility for the international relations of the territory to which the succession of States relates. In addition, it is justified in the case of part II by the various constraints which the movable nature of certain kinds of property places on the quest for solutions. Before going into the individual draft articles, the Commission wishes to make the following general observations concerning certain salient aspects of the provisions in the present section.

Choice between general rules and rules relating to property regarded in concreto

(2) On the basis of the reports submitted by the Special Rapporteur, the Commission considered which of three possible methods might be followed for determining the kind of rules that should be formulated for each category of succession. The first method consisted in adopting, for each category of succession, special provisions for each of those kinds of State property affected by a succession of States which are most essential and most widespread, so much so that they can be said to derive from the very existence of the State and represent the common denominators, so to speak, of all States, such as currency, treasury and State funds. The second method involved drafting, for each type of succession, more general provisions, not relating *in concreto* to each of these kinds of State property. A third possible method consisted in combining the first two and formulating, for each type of succession, one or two articles of a general character, adding perhaps one or two articles, where appropriate, relating to specific kinds of State property.

(3) The Commission decided to adopt the method to which the Special Rapporteur had reverted in his eighth

[120] Annex X, para. 1 and Annex XIV, para. 1 of the Treaty of Peace with Italy (United Nations, *Treaties Series*, vol. 49, pp. 209 and 225); and United Nations General Assembly resolutions 388 (V), of 15 December 1950, entitled "Economic and financial provisions relating to Libya" (art. 1, para. 1) and 530 (VI), of 29 January 1972, entitled "Economic and financial provisions relating to Eritrea" (art. 1, para. 1).

[121] Art. 60 of the Treaty of Lausanne (League of Nations, *Treaty Series*, vol. XXVIII, p. 53).

[122] See above, paras. (2)-(4) of the commentary to art. 10.

[123] See above, para. (11) of the commentary to art. 8.

report,[124] namely, that of formulating, for each type of succession, general provisions applicable to all kinds of State property. The Commission decided not to follow the first method, which was the basis of the Special Rapporteur's seventh report and which it had discussed at the twenty-seventh session (1975), not so much because a choice based on property regarded *in concreto* might be considered as being artificial, arbitrary or inappropriate as because of the extremely technical character of the provisions it would have been obliged to draft for such complex matters as currency, treasury and State funds.

Distinction between immovable and movable property

(4) In formulating, for each category of succession, general provisions applicable to all kinds of State property, the Commission found it necessary to introduce a distinction between immovable and movable State property, since these two categories of property cannot be given identical treatment and, in the case of succession to State property, must be considered separately, irrespective of the legal systems of the predecessor State and the successor State. The distinction, known to the main legal systems of the world, corresponds primarily to a physical criterion for differentiation, arising out of the very nature of things. Some property is physically linked to territory, so that it cannot be moved; this is immovable property. Then there are other kinds of property which are capable of being moved, so that they can be taken out of the territory; these constitute movable property. However, it seems desirable to make it clear that in adopting this terminology the Commission is not leaning towards the universal application of the laws of a particular system, especially those that derive purely from Roman law, because, as is the case with the distinction between public domain and private domain, a notion of internal law should not be referred to when it does not exist in all the main legal systems. The distinction made thus differs from the rigid legal categories found, for example, in French law. It is simply that the terms "movable" and "immovable" seem most appropriate for designating, for the purposes of succession to State property, property which can be moved or which is immobilized.

(5) Referring both categories of State property to "territory" is simply a reflection of the historical fact that State sovereignty developed over land. Whoever possessed land possessed economic and political power, and this is bound to have a far-reaching effect on present-day law. Modern State sovereignty is based primarily on a tangible element: territory. It can, therefore, be concluded that everything linked to territory, in any way, is a base without which a State cannot exist, whatever its political or legal system.

Criteria of linkage of the property to the territory

(6) Succession of States in respect of State property is governed, irrespective of the specific category of succession, by one key criterion applied throughout section 2 of part II of the draft: the linkage of such property to the territory. Applying this criterion, the basic principle may be stated that, in general, State property passes from the predecessor State to the successor State. It is through the application of a material criterion, namely, the relation which exists between the territory and the property by reason of the nature of the property or where it is situated, that the existence of the principle of the passing of State property can be deduced. Moreover, behind this principle lies the further principle of the actual viability of the territory to which the succession of States relates.

(7) As regards immovable State property, the principle of the linkage of such property to the territory finds concrete application by reference to the geographical situation of the State property concerned. Consequently, for the types of succession dealt with in section 2 of the present Part, as appropriate, the rule regarding the passing of immovable State property from the predecessor to the successor State is couched in the following terms, used in subparagraphs 2(*a*) of article 13 and 1(*a*) of articles 14 and 16:

> . . . immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

or in the somewhat different form used in subparagraph 1(*a*) of article 17:

> . . . immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated.

As adopted by the Commission, the rule relating to the passing of immovable State property does not apply to such property when it is situated outside the territory to which the succession of States relates, except in the cases of the newly independent State and of dissolution of a State, as is explained in the commentary to articles 14 and 17.

Special aspects due to the mobility of the property

(8) As regards movable State property, the specific aspects which are due to the movable nature or mobility of State property add a special difficulty to the problem of the succession of States in this sphere. Above all, the fact that the property is movable, and can therefore be moved at any time, makes it easy to change the control over the property. In the Commission's view, the mere fact that movable State property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. For the predecessor State to retain or the successor State to receive such property, other conditions must be fulfilled. Those conditions are not unrelated to the general conditions concerning viability, both of the territory to which the succession of States relates and of the predecessor State. They are closely linked to the general principle of equity, which should never be lost from view and which, in such cases, enjoins apportionment of the property between the successor State or States and the predecessor State, or among the successor States if there is more than one and the predecessor States ceases to exist. The predecessor State must not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory to

[124] *Yearbook . . . 1976*, vol. II (Part One), pp. 55 *et seq.*, document A/CN.4/292.

which the succession of States relates and of jeopardizing the viability of the successor State. Attention should therefore be drawn to the limits imposed by good faith, beyond which the predecessor State cannot go without failing in an essential international duty.

(9) Any movable State property of the predecessor State which is quite by chance in the territory to which the succession of States relates at the time when the succession of States occurs should not *ipso facto*, or purely automatically, pass to the successor State. If solely the place where the property is situated were taken into account, that would in some cases constitute a breach of equity. Moreover, the fact that State property may be where it is purely by chance is not the only reason for caution in formulating the rule. There may even be cases where the predecessor State situates movable property, not by chance, but deliberately, in the territory to which a succession of States will relate, without that property having any link with the territory, or at least without its having such a link to that territory alone. In such a case, it would again be inequitable to leave the property to the successor State alone. For example, it might be that the country's gold reserves or the metallic cover for the currency in circulation throughout the territory of the predecessor State had been left in the territory to which the succession of States relates. It would be unthinkable, merely because the entire gold reserves of the predecessor State were in that territory, to allow the successor State to claim them if the predecessor State was unable to evacuate them in time.

(10) On the other hand, while the presence of movable State property in the part of the territory which remains under the sovereignty of the predecessor State after the succession of States normally justifies the presumption that it should remain the property of the predecessor State, such a presumption, however natural it may be, is not necessarily irrefutable. The mere fact that property is situated outside the territory to which the succession of States relates cannot in itself constitute an absolute ground for retention of such property by the predecessor State. If the property is linked solely, or even concurrently, to the territory to which the succession of States relates, equity and the viability of the territory require that the successor State should be granted a right on that property.

(11) In the light of the foregoing considerations, the Commission came to the conclusion that as far as movable State property is concerned, the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the State property in question. Having in mind that, as explained above (para. 8), the legal rule applicable to the passing of movable State property should be based on the principle of viability of the territory and take into account the principle of equity, the Commission considered the question of how to give expression to the criterion of linkage between the territory and the movable State property concerned. Various expressions were suggested, including property having a "direct and necessary link" between the property and the territory, "property appertaining to sovereignty over the territory" and "property necessary for the exercise of sovereignty over the territory". Having discarded all these as not sufficiently clear, the Commission adopted the formula "property . . . connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". Consequently, for the categories of succession dealt with in section 2 of part II of the draft, as appropriate, the rule regarding the passing of movable State property from the predecessor to the successor State is couched in the following terms, which are used in articles 13 (subpara. 2(*b*)), 14 (subpara. 1(*d*)), 16 (subpara. 1(*b*)) and 17 (subpara. 1(*c*)):

> movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory [territories] to which the succession of States relates shall pass to the successor State.

Article 13. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Commentary

(1) As was indicated above,[125] the Commission, when establishing in 1974 its final draft on succession of States in respect of treaties, concluded that for the purpose of the codification of the modern law relating to that topic it was sufficient to arrange the cases of succession of States under three broad categories: (*a*) succession in respect of part of territory; (*b*) newly independent States; and (*c*) uniting and separation of States. In the 1974 draft, succession in respect of part of territory was dealt with in article 14, the introductory sentence of which reads as follows:

> When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State.

In adopting the foregoing text for the category of succession characterized as "succession in respect of part of territory", the Commission added the case of non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State to the case of part of the territory of a pre-existing State which becomes part of the territory of another State. The Commission considered that, for the purposes of succession in respect of treaties, the two cases could be dealt with together in the same provision, since one single principle, that of "moving treaty-frontiers", was applicable to both of them.

[125] See paras. 72-73 above.

(2) The quite unique nature of "succession in respect of part of territory" as compared with other categories of succession gives rise to difficulties in the context of the topic of succession of States in respect of matters other than treaties. A frontier adjustment, which as such raises a problem of "succession in respect of part of territory", may in some cases affect only a few unpopulated or scarcely populated acres of a territory, but in the case of some States may cover millions of square miles and be populated by millions of inhabitants. It is very unlikely that frontier adjustments affecting only a few unpopulated acres of land, such as that which enabled Switzerland to extend the Geneva-Cointrin airport into what was formerly French territory, will give rise to problems of State property such as currency and treasury and State funds. It should also be borne in mind that minor frontier adjustments are the subject of agreements between the States concerned, whereby they settle all questions arising between the predecessor State transferring territory and the successor State to which it is transferred, without the need to consult the population of that territory, if any. But while it is true that "succession in respect of part of territory" covers the case of a minor frontier adjustment which, moreover, is effected through an agreement providing a general settlement of all the problems involved, without the need to consult the population, it is nevertheless a fact that this category of succession also includes cases affecting territories and tracts of land that may be densely populated. In these cases, problems concerning the passing of State property such as currency and treasury and State funds certainly do arise, and in fact they are particularly acute.

(3) It is this situation—namely, the fact that the area affected by the territorial change may be either very densely populated or very sparsely populated—that accounts for the ambiguities, the uniqueness, and hence the difficulty, of the specific case of "succession in respect of part of territory" in the context of succession of States in respect of State property, archives and debts. In short, the magnitude of the problems of the passing of State property varies not just with the size of the territory transferred, but mainly according to whether or not it is necessary to consult the population of the territory concerned. These problems arise in each and every case, but more perceptibly and more conspicuously when the area of the transferred territory is large and densely populated. This incontrovertible reality is simply a reflection of the phenomenon of substitution of sovereignty over the territory in question, which inevitably manifests itself through an extension to the territory of the successor State's own legal order, and hence through a change, for example, in the monetary tokens in circulation. Currency, in particular, is a very important item of State property, being the expression of a regalian right of the State and the manifestation of its sovereignty.

(4) It should be added that cases of "succession in respect of part of territory" do not always involve agreements the existence of which would explain giving a residual character to the rules to be formulated to govern succession of States in respect of State property. Moreover, it is in those cases where a densely populated part of the territory of a State passes to another State—in other words, precisely the cases in which the problems of State property such as currency and treasury and State funds arise on a larger scale—that agreements for the settlement of such problems may be lacking. This is not a theoretical hypothesis. Apart from war or the annexation of territory by force, both of which are prohibited by contemporary international law, the case can be envisaged of detachment of part of a State's territory and its attachment to another State following a referendum on self-determination, or of secession by part of a State's population and attachment of the territory in which it lives to another State. In such situations, it is not always possible to count on the existence of an agreement between the predecessor State and the successor State, especially in view of the politically charged circumstances which may surround such territorial changes.

(5) It was in the light of the foregoing considerations that the Commission decided that, for the purposes of codifying the rules of international law relating to succession of States in respect of State property, in particular, it was appropriate to distinguish and deal separately in the present part with three cases covered by one single provision in article 14 of the 1974 draft on succession in respect of treaties: (i) the case where part of the territory of a State is transferred by that State to another State, which is the subject of the present article 13; (ii) the case where a part of the territory separates from that State and unites with another State, which is the subject of paragraph 2 of article 16 (Separation of part or parts of the territory of a State); and (iii) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, which forms the subject of paragraph 3 of article 14 (Newly independent State).

(6) Article 13 is therefore limited to cases of transfer of part of the territory of a State to another State. The word "transfer" in the title of the article and the words "is transferred" in *paragraph 1* are intended to emphasize the precise scope of the provisions of article 13. The cases of transfer of territory envisaged are those where the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of the territory, in view of its minor political, economic or strategic importance, or the fact that it is scarcely inhabited, if at all. Furthermore, the cases envisaged are always those which, according to article 3 of the draft, occur in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. In most of these cases, problems concerning the passing of such State property as currency, treasury and State funds, etc., do not actually arise or have no great relevance, and it is by the agreement of the predecessor and the successor States that the passing of State property, whether immovable or movable, from one State to the other, is normally settled. This primacy of the agreement in the situation covered by article 13 is reflected in paragraph 1 of the article, according to which, "When part of the territory of a State is transferred by that State to another State, the

passing of State property of the predecessor State to the successor State is to be settled by agreement between them". It should be understood that, according to paragraph 1, such passing of State property should in principle be settled by agreement and that the agreement should govern the disposition of the property, no duty to negotiate or agree being thereby implied.

(7) In the absence of an agreement between the predecessor and successor States, the provisions of *paragraph 2* of article 13 apply. Subparagraph (*a*) of paragraph 2 concerns the passing of immovable State property, whereas subparagraph (*b*) of the same paragraph deals with the passing of movable State property. As explained above,[126] *subparagraph* (a) of *paragraph 2* states the rule regarding the passing of immovable State property from the predecessor State to the successor State by reference to the geographical situation of the State property concerned, in conformity with the basic principle of the passing of State property from the predecessor State to the successor State. It provides, therefore, that "immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State". It may be convenient to repeat here that this rule does not extend to immovable State property situated outside the territory to which the succession of States relates—property which is and remains that of the predecessor State.

(8) *Subparagraph* (b) of *paragraph 2* states the rule regarding the passing of movable State property from the predecessor State to the successor State by reference to the material criterion of the connection between the property concerned and the activity of the predecessor State in respect of the territory to which the succession of States relates, as explained above.[127] By that criterion, there is no distinction to be made as to the actual location of the movable State property in question and, consequently, there is no need to refer expressly to the passing of property "on the date of the succession of States", the time element being, moreover, already implied in the definition of State property contained in article 8 of the draft. Subparagraph (*b*) of paragraph 2 therefore provides that "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State".

(9) The situation covered by the provisions of article 13 is to be distinguished from that of a part of the territory of a State which separates from that State and unites with another State, contemplated in *paragraph 2 of article 16*, as is indicated above (para. 5). In the case of such separation, as opposed to the case of transfer of a part of territory, the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned presupposes the expression of a conforming will on the part of the population of the separating part of the territory, in consequence of its extent and large number of inhabitants or of its importance from a political, economic, strategic or other point of view. It is in these cases of separation of part of the territory of a State that problems concerning the passing of such State property as currency, treasury and State funds arise or have a greater significance, and the resolution of these problems is not always achieved by agreement between the predecessor and the successor States, such agreement being unlikely when the territorial change in question is surrounded by politically charged circumstances, as is often the case. An agreement between the predecessor and successor States is certainly to be envisaged, but not with the primacy that is accorded it in article 13, since what is paramount in the case to which paragraph 2 of article 16 relates is the will of the population expressed in the exercise of the right to self-determination. Consequently, the formulation of paragraph 1 of article 16, which applies to the case of separation of part of the territory of a State when that part unites with another State, departs from that of paragraph 1 of article 13 and contains the following clause: "and unless the predecessor State and the successor State otherwise agree".

(10) A further difference between the rules applicable in the cases covered by article 13, on the one hand, and by paragraph 2 of article 16, on the other, resulting likewise from the factual differences between them as described in the preceding paragraph, is reflected in the provision whereby in the absence of the agreement envisaged in both articles, it is only in the latter case that a third category of State property passes to the successor State. Thus, according to article 16, when part of the territory of a State separates from that State and unites with another State (para. 2), unless the predecessor State and the successor State otherwise agree (para. 1), movable State property of the predecessor State other than that connected with activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State in an equitable proportion (subpara. 1(*c*) in conjunction with subpara. 1(*b*)). No such provision is required in the cases covered by article 13.

(11) The rules relating to the passing of State property in cases where part of the territory of a State is transferred to another State (art. 13) and where part of the territory of a State separates from that State and unites with another State (art. 16, para. 2) are founded in State practice, judicial decisions and legal theory, which admit generally the devolution of the State property of the predecessor State. Some examples may illustrate the point, even if they may seem broader in scope than the rules adopted.

(12) The devolution of such State property is clearly established practice. There are, moreover, many international instruments which simply record the express relinquishment by the predecessor State, without any *qui pro quo*, of all State property without distinction situated in the territory to which the succession of States relates. It may be concluded that relinquishment of the more limited category of immovable State property situated in that territory should *a fortiori* be accepted. The immovable State property which thus passes to the successor State is property which the predecessor State formerly used, as appropriate, in the portion of territory concerned, for the manifestation

[126] Introductory commentary to sect. 2, para. (7).
[127] *Ibid.*, in particular para. (11).

and exercise of its sovereignty, or for the performance of the general duties implicit in the exercise of that sovereignty, such as the defence of that portion of territory, security, promotion of public health and education, national development, and so on. Such property can easily be listed: it includes, for example, barracks, airports, prisons, fixed military installations, State hospitals, State universities, local government office buildings, premises occupied by the main central government services, buildings of the State financial, economic or social institutions, and postal and telecommunications facilities where the predecessor State was itself responsible for the functions which they normally serve.

(13) Two types of case will be omitted from the examples to follow, as being not sufficiently illustrative because the fact that they reflect the application of a general principle of devolution of State property is due to other causes of a peculiar and specific kind. The first type comprises all cessions of territories against payment. The purchase of provinces, territories and the like was an accepted practice in centuries past but has been tending towards complete extinction since the First World War, and particularly since the increasingly firm recognition of the right of peoples to self-determination. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly, these old cases of transfer are no longer demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer of State property does not here constitute proof of the existence of the rule, but simply of the capacity to pay.[128]

(14) The second type consists of forced cessions of territory, which are prohibited by international law, so that succession in respect of property in such cases cannot be regulated by international law.[129] In this connection, reference is made to the provisions of article 3 of the draft.

(15) A third set of cases, which are perhaps only too demonstrative, consists of those involving "voluntary cessions without payment". In these very special and marginal cases, the passing of immovable State property is neither controversial nor ambiguous, because it takes place not so much under the general principle of succession of States as by an expressly stated wish.[130]

(16) Territorial changes such as those covered by article 13 and article 16, paragraph 2, have occurred relatively often following a war. In such cases, peace treaties contain provisions relating to territories ceded by the defeated Power. For that reason, the provisions of peace treaties and other like instruments governing the problems raised by transfers of territory must be treated with a great deal of caution, if not with express reservations. Subject to that proviso, it may be noted that the major peace treaties which ended the First World War opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.[131]

(17) As to the Second World War, a Treaty of 29 June 1945 between Czechoslovakia and the USSR[132] stipulated the cession to the latter of the Trans-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919. An annexed protocol provided, in article 3, for the "free transfer of State property in the Sub-Carpathian Ukraine". The Treaty of Peace concluded on 12 March 1940 betwen Finland and the USSR[133] provided for reciprocal territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufacturing enterprises, telegraphic installations and electric stations. The Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy also contained provisions applying the principle of the passing of property, including immovable property, from the predecessor State to the successor State. In particular, paragraph 1 of annex XIV to the Treaty (Economic and Financial Provisions Relating to Ceded Territories) provided that "the successor State shall receive, without payment,

[128] See, for example, the Convention of Gastein of 14 August 1865, whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (English trans. in *British and Foreign State Papers, 1865-1866* (London, Ridgway, 1870), vol. LVI, p. 1028; the Convention ceding Alaska signed at Washington on 30 March 1867, whereby Russia sold its North American possessions to the United States of America for $7.2 million (Malloy, *op. cit.*, vol. II, p. 1521); the Convention whereby France ceded Louisiana to the United States of America for $15 million (*ibid.*, vol. I, p. 508).

[129] In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gave France Arras, Béthune, Lens, Bapaume, etc., specified that those places:

"... shall remain ... unto the said Lord the most Christian King, and to his Successors and Assigns ... with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priorys, Dignitys, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countries ... formerly belonging to the said lord the Catholick King ... And for that effect, the said Lord the Catholick King ... doth renounce [these rights] ... together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests ... the said Lord the Catholick King ... doth consent to be ... united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the Contrary ... notwithstanding." (For reference, see footnote 107 above.)

[130] See, for example, the cession by the United Kingdom to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; the decision in July 1821, by an assembly of representatives of the Uruguayan people held at Montevideo, concerning the incorporation of the Cisplatina Province; the voluntary incorporation in France of the free town of Mulhouse in 1798; the voluntary incorporation of the Duchy of Courland in Russia in 1795; the Treaty of Rio of 30 October 1909, between Brazil and Uruguay, for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Sardinia, without payment, under the Treaty of Zurich of 10 November 1859, etc.

[131] See articles 256 of the Treaty of Versailles, 208 of the Treaty of Saint-Germain-en-Laye, 191 of the Treaty of Trianon, and 142 of the Treaty of Neuilly-sur-Seine (for references, see footnotes 110-113 above).

[132] United Nations, *Treaty Series*, vol. 504, p. 310.

[133] English trans. in *Supplement to the American Journal of International Law*, vol. 34 (1940), pp. 127-131.

Italian State and para-statal property within territory ceded to it . . .".[134]

(18) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property, and therefore of immovable property. This is true, in the first place, of national courts. According to Rousseau, "the general principle of the passing of public property to the new or annexing State is now accepted without question by national courts".[135]

(19) Decisions of international jurisdictions confirm this rule. In the *Péter Pázmány University* case, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "principle of the generally accepted law of State succession".[136] The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 confirmed the principle of the devolution to the successor State, in full ownership, of immovable State property. This can be readily deduced from one of its decisions. The Commission found that:

> The main argument of the Italian Government conflicts with the very clear wording of paragraph 1 [of annex XIV]: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including *biens communaux* within the territories ceded.[137]

(20) As far as movable State property is concerned, the Commission has already explained—the reasons why the principle of the linkage of such property to the territory should not find concrete application by reference to the geographical situation of the property in question, in view of the special aspects due to the mobility of that property.[138] The Commission decided to give expression to the criterion of linkage between the territory and the movable property concerned by the formula: "property . . . connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". That concept may be regarded as closely related to that sanctioned by international judicial decisions, which concerns the transfer of property belonging to local authorities necessary for the viability of the local territorial authority concerned. For example, in the dispute concerning the apportionment of the property of local authorities whose territory had been divided by a new delimitation of the frontier between France and Italy, the above-mentioned Franco-Italian Conciliation Commission noted that:

> . . . the Treaty of Peace did not reflect any distinctions . . . between the public domain and the private domain that might exist in the legislation of Italy or the State to which the territory is ceded. However, the nature of the property and the economic use to which it is put have a certain effect on the apportionment.
>
> The apportionment must, first of all, be just and equitable. However, the Treaty of Peace does not confine itself to this reference to justice and equity, but provides a more specific criterion for a whole category of municipal property and for what is generally the most important category.
>
> The question may be left open whether the . . . [Treaty] provides for two types of agreement . . ., one kind apportioning the property of the public authorities concerned, the other ensuring "*the maintenance of the municipal services essential to the inhabitants*" . . .". But even if that *were so, the criterion of the maintenance of the municipal services necessary to the inhabitants should* a fortiori *play a decisive role*" when these services—as will usually be the case—are provided by property belonging to the municipality which must be apportioned. The apportionment should be carried out according to a *principle of utility*," since in this case that principle must have seemed to the drafters of the Treaty the most compatible with justice and equity.[139]

(21) As regards, more specifically, movable State property, the cases of currency (including gold and foreign exchange reserves) and State funds will be discussed in turn below, by way of example, these cases being sufficiently illustrative for the present purpose.

Currency

(22) A definition of currency for the purposes of international law should take account of the following three fundamental elements: (*a*) currency is an attribute of sovereignty, (*b*) it circulates in a given territory and (*c*) it represents purchasing power. It has been observed that this legal definition:

> necessarily relies on the concept of statehood or, more generally, that of *de jure* or *de facto* sovereign authority. It follows from this proposition that media of exchange in circulation are, legally speaking, not currency, unless their issue has been established or authorized by the State and, *a contrario*, that currency cannot lose its status otherwise than through formal demonetization.[140]

For the purposes of the present topic, this means that the predecessor State loses and the successor State exercises its own monetary authority in the territory to which the succession of States relates. That should mean that, at the same time, the State patrimony associated with the expression of monetary sovereignty

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[134] United Nations, *Treaty Series*, vol. 49, p. 225.

[135] C. Rousseau, *Cours de droit international public — Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964-1965), p. 139.

Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939: see *Annual Digest and Reports of Public International Law Cases, 1919-1942, Supplementary Volume* (London, 1947), case No. 44, pp. 74-76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 in the case of Amine Namika Sultan *v.* Attorney-General (*see Annual Digest . . . 1947* (London, 1951), case No. 14, pp. 36-40), which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of art. 60 of the Treaty of Lausanne of 1923.

[136] See *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* (The Péter Pázmány University *v.* the State of Czechoslovakia), Judgment of 15 December 1933 (*P.C.I.J.*, Series A/B, No. 61, p. 237).

[137] Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: Decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 514). (The provisions of para. 1 of annex XIV to the Treaty are mentioned in para. (17) of the present commentary, above.)

[138] See above, paras. (8)-(11) of the introductory commentary to sect. 2.

[139] United Nations, *Report of International Arbitral Awards*, vol. XIII (*op. cit.*), p. 519.

[140] D. Carreau, *Souveraineté et coopération monétaire internationale* (Paris, Cujas, 1970), p. 27.

or activity in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in the territory) must pass from the predecessor State to the successor State.

(23) The normal relationship between currency and territory is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, the complete surrender by the predecessor State of monetary powers in the territory considered and, secondly, its replacement by the successor State in the same prerogatives in that territory. But both the surrender and the assumption of powers must be organized on the basis of a factual situation, namely, the impossibility of leaving a territory without any currency in circulation on the date on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange which constitute the security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary space". It is because the circulation of currency implies security or backing—the public debt, in the last analysis—that currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or foreign exchange reserves and all assets of the institution of issue. This absolute inseparability, after all, merely describes the global and "mechanistic" fashion in which the monetary phenomenon itself operates.

(24) In the world monetary system as it exists today, currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing. For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. This, however, does not always happen in practice. The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are temporarily or fortuitously present in the territory to which the succession of States relates, without the predecessor State's having intended to allocate them to that territory, obviously they have no link or relationship with the territory and cannot pass to the successor State. The gold owned by the Bank of France that was held in Strasbourg during the Franco-German War of 1870 could not pass to Germany after Alsace-Lorraine was annexed to that country unless it were established that that gold had been "allocated" to the transferred territory.

(25) When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.[141]

(26) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.[142] Under the peace treaties concluded, the new Soviet regime became fully responsible for the debt represented by the paper money issued by the Russian State Bank in these four countries.[143] The provisions of some of these instruments indicated that the Federal Socialist Republic of Soviet Russia (FSRSR) *released* the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countries during the war.[144] At the same time, and in these same treaties, part of the bullion reserves of the Russian State Bank was transferred to each of these States. The ground given in the case of Poland is of some interest: the 30 million gold roubles paid by the FSRSR under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

State funds

(27) State public funds in the territory to which the succession of States relates should be understood to mean cash, stocks and shares which, although they form part of the over-all assets of the State, have a link with that territory by virtue of the State's sovereignty over or activity in that region. If they are connected with the activity of the predecessor State in respect of the territory to which the succession of States relates, State funds, whether liquid or invested, pass to the successor State. The principle of connection with the activity is decisive in this case, since it is obvious that funds of the predecessor State which are in transit through the territory in question, or are temporarily or fortuitously present in that territory, do not pass to the successor State.

(28) State public funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.[145]

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[141] See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, *Treaty Series*, vol. 117, p. 39).

[142] No reference is made here to the case of Finland, which already enjoyed monetary autonomy under the former Russian régime, nor to that of Turkey.

[143] See the following treaties: with Estonia, of 2 February 1920, art. 12; with Latvia, of 11 August 1920, art. 16; with Lithuania, of 12 July 1920, art. 12; and with Poland, of 18 March 1921, art. 19 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122; vol. VI, p. 123 respectively).

[144] See B. Nolde, "La monnaie en droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1929-II* (Paris, Hachette, 1930), vol. 27, p. 295.

[145] Decision of the Supreme Court of Poland in the case *Polish State Treasury* v. *Deutsche Mittelstandskasse (1929)* (digest by the Secretariat in *Yearbook ... 1963*, vol. II, p. 133, document A/CN.4/157, para. 337).

(29) As part of the "free transfer of State property", the USSR received public funds situated in the Trans-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain-en-Laye of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.[146]

Article 14. Newly independent State

1. When the successor State is a newly independent State:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) immovable property having belonged to the territory to which the succession of States relates, situated outside it and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*c*) immovable State property of the predecessor State other than that mentioned in subparagrah (*b*) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(*d*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*e*) movable property having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*f*) movable State property of the predecessor State other than the property mentioned in subparagraphs (*d*) and (*e*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

[146] See footnote 132 above.

Commentary

(1) Article 14 concerns succession to State property in the case of a newly independent State. The term "newly independent State" as used in the present draft is defined in article 2, paragraph 1(*e*), and reference should therefore be made to the relevant paragraph of the commentary to article 2.[147]

(2) In contrast to other categories of State succession where, until the occurrence of the succession, the predecessor State possesses the territory to which the succession of States relates and exercises its full sovereignty there, the category covered by this article involves a dependent or non-self-governing territory which has a special juridical status under the Charter of the United Nations. As the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations states,[148] such a territory has:

> a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Moreover, in accordance with General Assembly resolution 1514 (XV) of 14 December 1960, every people, even if it is not politically independent at a certain stage of its history, possesses the attributes of national sovereignty inherent in its existence as a people. There is also no doubt, as is explained below (paras. (26)-(32)) that every people enjoys the right of permanent sovereignty over its wealth and natural resources.

(3) Although the question might be raised as to the usefulness of the Commission's making special provisions relating to newly independent States, in view of the fact that the process of decolonization is practically finished, the Commission is convinced of the need to include such provisions in the present draft. A draft of articles on a topic which, like succession of States in matters other than treaties, necessarily presupposes the exercise of a right which is at the forefront of United Nations doctrine and partakes of the character of *jus cogens* the right of self-determination of peoples, cannot ignore the most important and widespread form of the realization of that right in the recent history of international relations: that is, the process of decolonization which has taken place since the Second World War. In fact, the Commission cannot but be fully conscious of the precise mandate it has received from the General Assembly, in regard to its work of codification and progressive development of the rules of international law relating to succession of States, to examine the problems of succession of States with appropriate reference to the views of States that have achieved independence since the Second World War.[149] Although the process of decolonization has already been largely effected, it has not yet been completed, as is confirmed

[147] See above para. (6) of the commentary to article 2.

[148] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[149] General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

in the 1980 report of the Special Committee of 25,[150] which points out that many dependent or Non-Self-Governing Territories still remain to be decolonized. Moroever, the usefulness of the present draft articles is not limited to dependent or Non-Self-Governing Territories yet to be decolonized. In many instances, the effects of decolonization, including, in particular, problems of succession to State property, remain for years after political independence is achieved. The necessity of including provisions on newly independent States was fully recognized by the Commission in the course of its work on succession of States in respect of treaties and found reflection in the final draft on that topic submitted in 1974 for consideration by the General Assembly, as well as in the 1978 Vienna Convention adopted on the basis of that final draft. In the present case, there is no reason to depart from the categorization established in the draft articles on succession of States in respect of treaties; on the contrary, the reasons for maintaining the category of succession involving "newly independent State" are equally, if not more compelling, in the case of succession of States in respect of State property, archives and debts. Besides, in view of the close link and the parallelism between the two sets of draft articles, there would be an inexplicable gap in the present draft if no provision were made for newly independent States.

(4) Article 14 covers the various situations that may result from the process of decolonization: the commonest case, where a newly independent State emerges from a dependent territory; the case where such a State is formed from two or more dependent territories (para. 2); and the case where a dependent territory becomes part of the territory of an existing State other than the State which was administering it (para. 3). In all these cases the rules relating to the passing of State property should be the same, since the basis for the succession in each case is the same: decolonization. It is for this reason that, as has been indicated,[151] the Commission considered it appropriate to deal with the last case in the present article, whereas in the 1974 draft on succession of States in respect of treaties, that case was covered by the provisions of article 14 (Succession in respect of part of territory),[152] since it is a question of the applicability of the same principle—that of the "moving treaty-frontiers" rule—to all the situations covered.

(5) The rules relating to the passing of State property in the case of newly independent States vary somewhat from those relating to other categories of succession, in order to take full account of the special circumstances surrounding the emergence of such States. The principle of viability of the territory becomes imperative in the case of States achieving independence from situations of colonial domination, and the principle of equity requires that preferential treatment be given to such States in the legal regulation of succession to State property. Two main differences are, therefore, to be indicated. First, immovable property situated in the dependent territory concerned and movable property connected with the activity of the predecessor State in respect of the dependent territory concerned should, as a general rule, pass to the successor State upon the birth of a newly independent State, whether it is formed from one or two or several dependent territories, or upon the dependent territory's decolonization through integration or association with another existing State, reference to an agreement being unnecessary, by contrast with the case of the articles relating to other categories of succession. The reason why article 14 does not, with reference to newly independent States, use the expressions "in the absence of an agreement" or "unless the predecessor State and the successor State otherwise agree", which are employed in other articles of section 2, is not so much because a dependent territory which is not yet a State could not, strictly speaking, be considered as possessing the capacity to conclude international agreements; rather, it is principally in recognition of the very special circumstances which accompany the birth of newly independent States as a consequence of decolonization and which lead, when negotiations are undertaken for the purpose of achieving independence, to results that are, in many instances, distinctly unfavourable to the party acceding to independence, because of its unequal and unbalanced legal, political and economic relationship with the former metropolitan country.

(6) The second difference resides in the introduction of the concept of the contribution of the dependent territory to the creation of certain immovable and movable State property of the predecessor State so that such property shall pass to the successor State in proportion to the contribution made by the dependent territory. This provision represents a concrete application of the concept of equity forming part of the material content of a rule of positive international law, which is designed to preserve, *inter alia*, the patrimony and the historical and cultural heritage of the people inhabiting the dependent territory concerned. In cases of newly independent States, entire nations are affected by the succession of States which have contributed to the creation of the predecessor State's property. It is only equitable that such property should pass to the successor State in proportion to the contribution of the dependent territory to its creation.

(7) *Subparagraph 1*(a) of article 14 regulates the problem of immovable State property of the predecessor State situated in the territory which has become independent. In accordance with the principle of the passing of State property based on the criterion of linkage of the property to the territory, this subparagraph provides, as in the articles concerning other categories of succession, that immovable property so situated shall pass to the successor State. This solution is generally accepted in legal literature and in State practice, although in neither case is express reference always made to "immovable" property of the predecessor State "situated in the territory"; rather, the reference is frequently to property in general, irrespective of its nature or its geographical situation. Thus, if

[150] Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 23* (A/35/23/Rev.1)).

[151] See para. 75 above.

[152] That article corresponds to art. 15 of the 1978 Vienna Convention.

general transfer is the rule, the passing to the successor State of the more limited category of property provided for in this subparagraph must *a fortiori* be permitted.

(8) Reference may be made in this connection to article 19, first paragraph, of the Declaration of Principles concerning Economic and Financial Co-operation of 19 March 1962 (Evian agreement between France and Algeria), which provided that:

> Public real estate of the [French] State in Algeria will be transferred to the Algerian State . . . .[151]

In fact, all French military real estate and much of the civil real estate (excluding certain property retained by agreement and other property which is still in dispute) has, over the years, gradually passed to the Algerian State.

(9) A great many bilateral instruments or unilateral enactments of the administering or constituent Power simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all State property or, even more broadly, all public property without distinction, situated in the territory to which the succession of States relates. For example, the Constitution of the Federation of Malaya (1957) provided that all property and assets in the Federation or one of the colonies which were vested in Her Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or specifications, authorizes the transfer of all the property, of whatever kind, of the predecessor State.[154] Reference may also be made to the Final Declaration of the International Conference in Tangier, of 29 October 1956, although it is not strictly applicable since the International Administration of Tangier cannot be regarded as a State. Article 2 of the Protocol annexed to the Declaration stated that the Moroccan State, "which recovers possession of the public and private domain entrusted to the International Administration . . . receives the latter's property . . .".[155] Among other examples that may be given is the "Draft Agreement on Transitional Measures" of 2 November 1949 between Indonesia and the Netherlands, adopted at the end of the Hague Round-Table Conference (August-November 1949),[156] which provided for the devolution of all property, and not only immovable property, in the Netherlands public and private domain in Indonesia. A subsequent military agreement transferred to Indonesia, in addition to some warships and military maintenance equipment of the Netherlands fleet in Indonesia, which constituted movable property, all fixed installations and equipment used by the colonial troops.[157] Similarly, when the Colony of Cyprus attained independence, all property of the Government of the island (including immovable property) became the property of the Republic of Cyprus.[158] In the case of Libya, it was to receive "the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration in Libya".[159] In particular, the following property was to be transferred immediately: "the public property of the State *(demanio pubblico)* and the inalienable property of the State *(patrimonio indisponibile)* in Libya", as well as "the property in Libya of the Fascist Party and its organizations".[160] Likewise, Burma was to succeed to all property in the public and private domain of the colonial Government,[161] including fixed military assets of the United Kingdom in Burma.[162]

(10) The Commission is not unaware of agreements concluded between the predecessor State and the newly independent successor State under which the latter has relinquished in favour of the former its right of ownership to the part of the State property which had passed to it on the occurrence of the succession of States.[163] The independence agreements were followed by various protocols concerning property under which the independent State did not succeed to the whole of the property belonging to the predecessor State. This was usually done in order to provide for common needs in an atmosphere of close co-operation between the former metropolitan State and the newly independent State. The forms those agreements took were, however, varied. In some cases, the pre-independence *status quo*, with no transfer of property, was provisionally maintained.[164] In others, devolution of the (public and private) domain of the former metropolitan State

[153] United Nations, *Treaty Series*, vol. 507, p. 65.

[154] *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 85-86. See also the Constitution of the Independent State of Western Samoa (1962), which declared: "All property which immediately before Independence Day is vested in Her Majesty . . . or in the Crown . . . shall, on Independence Day, vest in Western Samoa" (*ibid.*, p. 117).

[155] United Nations, *Treaty Series*, vol. 263, p. 171.

[156] *Ibid.*, vol. 69, p. 266.

[157] *Ibid.*, p. 288.

[158] Treaties concerning the establishment of the Republic of Cyprus signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. (*ibid.*, vol. 382, annex E, pp. 130-138, art. 1 and *passim*).

[159] General Assembly resolution 388 (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", art. 1.

[160] *Ibid.*, para. 2(*b*). The inalienable property of the State is defined in arts. 822-828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks (i.e. immovable property), and arms, munitions, etc. (i.e. movable property).

[161] See "Government of Burma Act, 1935" (United Kingdom, *The Public General Acts 1935-36* (H.M. Stationery Office), vol. I, chap. 3, p. 332).

[162] See United Kingdom, *Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the Recognition of Burmese Independence and Related Matters*, annex: Defence Agreement signed on 29 August 1947 in Rangoon, Cmd. 7360 (London, H.M. Stationery Office, 1948).

[163] See G. Fouilloux, "La succession aux biens publics français dans les Etats nouveaux d'Afrique", in *Annuaire français de droit international, 1965* (Paris), vol. XI, pp. 885-915; *et idem*, "La succession des Etats de l'Afrique du Nord aux biens publics français", in *Annuaire de l'Afrique du Nord, 1966* (Paris), pp. 51-79.

[164] Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad, signed in Paris on 12 July 1960 (art. 4) (*Materials on Succession of States (op. cit.)*, pp. 153-154). A protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "common needs" and enabled the successor State to waive the devolution of certain property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad of 25 October 1961 (with the text of the Protocol annexed) (*Journal officiel de la République française, Lois et décrets* (Paris), 95th year, No. 69 (21 March 1963), pp. 2721-2722)).

was affirmed as a principle, but was actually implemented only in the case of property which would not be needed for the operation of its various military or civilian services.[165] Sometimes the agreement with the territory that had become independent clearly transferred all the public and private domain to the successor, which incorporated them in its patrimony, but under the same agreement expressly retroceded parts of them either in ownership or in usufruct.[166] In some cases the newly independent State agreed to a division of property between itself and the former metropolitan State, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and the presence of the former metropolitan State.[167] Lastly, there have been cases where a treaty discarded the distinctions between public and private domains of the territory or of the metropolitan State, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements:

> The Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a global settlement based on equity and satisfying their respective needs.[168]

(11) However, it should be pointed out that these instruments have usually been of a temporary character. The more balanced development of the political relations between the predecessor State and the newly independent successor State has in many cases enabled the successor State, sooner or later, to regain the immovable State property situated in its territory which had been the subject of agreements with the former metropolitan State.

(12) *Subparagraphs 1*(b) *and 1*(e) of article 14 deals with a problem unique to newly independent States. It concerns the cases of immovable and movable property which, prior to the period of dependence, belonged to the territory to which the succession of States relates. During the period of its dependence, some or all of such property may well have passed to the predecessor State administering the territory. This might be immovable property such as embassies and administrative buildings or movable property of cultural or historical significance. The subparagraphs set forth a rule of restitution of such property to the former owner. The text of subparagraph (*b*) refers to "immovable property", and that of subparagraph (*e*) to "movable property", and both state that such property shall pass to the successor State. In the provisional draft, immovable property had been excluded from paragraph 1 in the present case since it was thought that the provision now embodied in subparagraph 1(*a*) covered all "immovable State property of the predecessor State situated in the territory . . .", including immovable property which had belonged to the territory before it became independent. In second reading, however, the Commission, in order to avoid problems of interpretation, deemed it appropriate to make specific provision in paragraph 1 for this case as regards immovable property as well.

(13) The situation covered by paragraph 1, subparagraphs (*b*) and (*e*), needs to be provided for expressly, even though it might be considered to be a particular aspect of the larger question relating to the "*biens propres*" of the dependent territory. The provisions of article 14 are not intended to apply to property belonging to the Non-Self-Governing Territory, as that property is not affected by the succession of States. Generally speaking, colonies enjoyed a special régime under what was termed a legislative and conventional speciality. They possessed a certain international personality so that they could own property inside and outside their territory. Consequently, there is no reason why succession should cause colonies to lose their own property. In the absence of express regulations for the situations covered by subparagraphs 1(*b*) and 1(*e*), the question might be raised whether, in the case of a State having become a dependent territory, property which, having belonged to that State, passed to the administering Power, was still to be regarded as property of the dependent territory or not.

(14) It should be noted that, unlike the other subparagraphs of paragraph 1, *subparagraphs* (b) *and* (e) do not mention "State property", but merely "property", at the beginning of the sentence. This is intended to widen the scope of the provision in order to include the property which, prior to the period of dependence, belonged to the territory of the successor newly independent State, whether that territory, during the predependence period, was an independent State or an autonomous entity of other form, such as a tribal group or a local government.

(15) *Subparagraph 1*(c) of article 14 relates to the apportionment between the predecessor State and the successor State of immovable State property of the predecessor State, other than that mentioned in subparagraph (*b*) and situated outside the territory to which the

[165] See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and Senegal of 18 September 1962, with the text of the Convention annexed (*ibid.*, p. 2720). Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered . . . in the name of the French Republic" to Senegal. However, art. 2 specifies: "Nevertheless, State appurtenances shall remain under the ownership of the French Republic and be registered in its name if they are certified to be needed for the operation of its services . . . and are included in the list" given in an annex. This provision concerns, not the *use* of State property for the needs of the French services, but the *ownership* of such property.

[166] A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26 October 1963) (*ibid.*, No. 256 (31 October 1963), pp. 9707-9708). Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "Installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

[167] See Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property agreement between France and the Gabonese Republic of 6 June 1961 (*ibid.*, No. 69 (21 March 1963), pp. 2718-2719).

[168] Art. 31 of the Franco-Malagasy agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (*ibid.*, 92nd year, No. 167 (20 July 1960), p. 6615). A Franco-Malagasy Protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this Protocol (*ibid.*, 95th year, No. 69 (21 March 1963), pp. 2719-2720)). This confirms the situation created by another economic co-operation agreement, of 27 June 1960, and acknowledges—but only in this context—Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

succession of States relates, to the creation of which the dependent territory has contributed. As in the case of subparagraph (*b*), this provision has been included in paragraph 1 during the second reading in order to make it as complete as possible so as to avoid problems of interpretation that might arise from a *lacuna* on the point. Subparagraph (*c*) corresponds to the provision of *subparagraph* (f), which relates to the apportionment between the predecessor State and the successor State of movable State property of the predecessor State other than the property falling under subparagraphs (*d*) and (*e*), to the creation of which the dependent territory contributed. Like subparagraph (*e*), subparagraph (*f*) deals with such movable property regardless of whether it is situated in the territory of the predecessor State, of the successor State or of a third State. In this connection, the question may be asked, for example, whether successor States can claim any part of the subscriptions made by the administering States to the shares of the capital stock of international or regional financial institutions such as the World Bank. Although there seems to be no precedent regarding the apportionment of such assets between the predecessor State and the successor State, the question may well arise in view of the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories as such. Such property may well be considered property which belonged as of right to the dependent territory in the proportion determined by the territory's contribution. The Commission believes that the rule set forth in subparagraph (*f*), as well as the similar rule provided for in subparagraph (*e*), will make it possible to solve more easily and equitably many of the problems arising in this respect.

(16) *Subparagraph 1*(d) of article 14 concerns the movable State property "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates", and states the common rule adopted with respect to the transfer of part of the territory of a State, the separation of part or parts of the territory of a State, and the dissolution of a State.[169] It should be noted that movable State property that may be located in the dependent territory only temporarily or fortuitously, like the gold of the Banque de France which was evacuated to West Africa during the Second World War, is to be excluded from the application of the rule, since it is not actually connected with the activity of the State "in respect of the territory to which the succession of States relates".

(17) State practice relating to the rule enunciated in paragraph 1 can be discussed with reference to two main categories of movable State property, namely, currency and State funds.

(18) The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State, since it is a regalian right and an attribute of public authority. In this sense, as far as the privilege of issue is concerned, there is no question of succession of States involved; the predecessor State loses its privilege of issue in the dependent territory and the newly independent State exercises its own privilege, which it derives from its own sovereignty, upon achieving independence. Nor does the question of monetary tokens issued in the dependent territory by its own institution of issue relate directly to succession of States.

(19) Among the examples that may be given is that of the various Latin American colonies which became independent at the beginning of the nineteenth century, from which the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscription of the new State for the image and name of His Most Catholic Majesty on the coins in circulation, or to giving some other name to the Spanish peso, without changing its value or the structure of the currency.

(20) In the case of India, that country succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.[170] However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.[171]

(21) The French Government withdrew its monetary tokens from the French Establishments in India, but agreed to pay compensation. Article 23 or the Franco-India Agreement of 21 October 1954 stated:

> The Government of France shall reimburse to the Government of India within a period of one year from the date of the *de facto* transfer the equivalent value at par in £ sterling or in Indian rupees of the currency withdrawn from circulation from the Establishments after the *de facto* transfer.[172]

(22) State practice not being uniform, it is not possible to establish a rule applicable to all situations regarding succession in respect of currency; it is necessary to examine the concrete situation obtaining on the date of the succession of States. If the currency is issued by an institution of issue belonging to the territory itself, independence will not change the situation. However, if the currency issued for the territory by and under the responsibility of a "metropolitan" institution of issue is to be kept in circulation, it must be backed by gold and reserves, for reasons already explained in the commentary to article 13.

(23) With regard to State funds, some examples may be given. On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" treasury funds and the profits derived by the two States from

[169] Reference may be made in this connection to paras. (8) to (11) of the introductory commentary to section 2, which are relevant to this subparagraph.

[170] See Financial Agreement relating to sterling balances of India (with Exchange of Notes), signed at London on 14 August 1947 (United Nations, *Treaty Series*, vol. 11, p. 371).

[171] For details, see I. Paenson, *Les conséquences financières de la succession des Etats (1932-1953)* (Paris, Domat-Monchrestien, 1954), *passim*, and in particular pp. 65-66 and 80.

[172] India, *Foreign Policy of India: Texts of Documents, 1947-64* (New Delhi, Lok Sabha (Secretariat), 1966), p. 212.

various concessions. The two countries succeeded to the assets of the Banque de Syrie et du Liban, although most of these assets were blocked and were released only progressively over a period extending to 1958.[173] In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of twenty years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.[174]

(24) *Paragraph 2* concerns the cases of newly independent States formed from two or more dependent territories. It states that the general rules set out in paragraph 1 of article 14 apply to such cases. As examples of such newly independent States, mention may be made of Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria, and the northern region of the British Trust Territory of the Cameroons; Ghana, which was formed from the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate, and the Trust Territory of Togoland; and the Federation of Malaya, which emerged in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The Commission finds no reason to depart from the formula contained in article 30, paragraph 1, of the 1978 Vienna Convention, which deals with the case of newly independent States formed from two or more territories in the same way as the case of newly independent States which emerge from one dependent territory, for the purpose of applying the general rules concerning succession in respect of treaties.

(25) *Paragraph 3* involves a dependent territory which becomes part of the territory of an existing State other than the administering State of the dependent territory. As explained above,[175] the Commission considered it more appropriate to deal with this case together with that of newly independent States, unlike the 1978 Vienna Convention, in which this case is included under "Succession in respect of part of territory" together with the case of simple transfer of part of a territory. Association or integration with an independent State is a mode of implementing the right of self-determination of peoples, exactly like the establishment of a sovereign and independent State, as is clearly stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It is therefore more logical to include this paragraph in an article dealing with newly independent States. In view of the basic similarity of the questions involved in succession in respect of State property when the successor State is a newly independent State and when it is a State with which a dependent territory has been integrated or associated, the present paragraph calls for the application to both cases of the same general rules provided for in paragraph 1 of the article.

(26) *Paragraph 4* is a provision which confirms that the principle of the permanent sovereignty of every people over its wealth and natural resources takes precedence over agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the principles stated in article 14. The principle of the permanent sovereignty of every people over its wealth and natural resources has been forcefully affirmed in a number of General Assembly resolutions and in other United Nations instruments.[176]

(27) The formulation of the Charter of Economic Rights and Duties of States under the auspices of the United Nations Conference on Trade and Development looms large among recent developments within the United Nations system concerning permanent sovereignty over natural resources. This Charter, which was adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, should, according to the resolution, "constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries". The fifteen fundamental principles which, according to this Charter (chap. I), should govern economic as well as political relations among States, include:

> Remedying of injustices which have been brought about by force and which *deprive a nation of the natural means necessary for its normal development.**

State property is certainly one of those necessary "natural means". Article 2 (para. 1) of this Charter states that:

> Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

Expanding the passage from the resolution quoted above, article 16 (para. 1) states:

> It is the right and duty of all States, individually and collectively, to eliminate colonialism . . . neo-colonialism . . . and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the *restitution** and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

[173] For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (*Journal officiel de la République française, Lois et décrets* (Paris), 82nd year, No. 60 (10 March 1950), pp. 2697-2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (*ibid.*, 81st year, No. 64 (14 and 15 March 1949), pp. 2651-2654; also United Nations, *Treaty Series*, vol. 173, p. 99).

[174] The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign and for certain costs relating to demobilization.

[175] See above, para. 75.

[176] See, for example, General Assembly resolutions 626 (VII) of 21 December 1952; 1803 (XVII) of 14 December 1962; 2158 (XXI) of 25 November 1966; 2386 (XXIII) of 19 November 1968; 2692 (XXV) of 11 December 1970. See also Economic and Social Council resolutions 1737 (LIV) of 4 May 1973 and 1956 (LIX) of 25 July 1975. See, further, art. 1, para. 2, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, annex).

(28) The General Assembly, meeting in special session for the first time in the history of the United Nations to discuss economic problems following the "energy crisis", gave due prominence to the "full permanent sovereignty of every State over its natural resources and all economic activities" in its Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI) of 1 May 1974). In section VIII of its Programme of Action on the Establishment of a New International Economic Order (resolution 3202 (S-VI) of 1 May 1974), the Assembly stated that:

All efforts should be made:

(*a*) To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources.

(29) Just as individuals are equal before the law in a national society, so all States are said to be equal in the international sphere. However, in spite of this theoretical equality, flagrant inequalities remain among States so long as sovereignty—a system of reference—is not accompanied by economic independence. When the elementary bases of national economic independence do not exist, it is idle to speak of the principle of sovereign equality of States. If it is really desired to free the principle of the sovereign equality of States from its large element of illusion, the formulation of the principle should be adapted to modern conditions in such a way as to restore to the State the elementary bases of its national economic independence. To this end, the principle of economic independence, invested with a new and vital legal function and elevated accordingly to the status of a principle of contemporary international law, must be reflected, in particular, in the right of peoples to dispose of their natural resources and in the prohibition of all forms of unwarranted intervention in the economic affairs of States, together with the outlawing of the use of force and of any form of coercion in economic and commercial relations. General Assembly resolution 1514 (XV) of 14 December 1960, which did not neglect the right of peoples to dispose of their natural resources, and, more particularly, resolution 1803 (XVII) and other subsequent resolutions which affirmed the principle of the permanent sovereignty of States over their natural resources,[177] demonstrate the efforts of the General Assembly to make a legal reality of the fundamental matter of the principle of economic independence, and to remedy the disturbing fact that the gap between developed and developing States is constantly widening.

(30) It is by reference to these principles that an appraisal should be made of the validity of the so-called "co-operation" or "devolution" agreements and of all bilateral instruments which, under the pretext of establishing "special" or "preferential" ties between the new States and the former colonial Powers, impose on the former excessive conditions which are ruinous to their economies. The validity of treaty relations of this kind should be measured by the degree to which they respect the principles of political self-determination and economic independence. Some members of the Commission expressed the view that any agreements which violate these principles should be void *ab initio*, without even any need to wait until the new State is in a position formally to denounce their unfair character. Their invalidity should derive intrinsically from contemporary international law and not simply from their subsequent denunciation.

(31) Devolution agreements must therefore be judged according to their content. Such agreements do not, or only rarely, observe the rules of succession of States. In fact, they impose new conditions for the independence of States. For example, the newly independent State can remain independent only if it agrees not to claim certain property, or to assume certain debts, extend certain laws or respect certain treaties of the administering Power. Therein lies the basic difference from the other categories of succession, where the independence of the will of the contracting parties must be recognized. In the case of devolution agreements, freedom to conclude an agreement results in conditions being imposed on the very independence of the State itself. Through their restrictive content such agreements institute a "probation" system, the conditional independence, of the newly independent State. It is for this reason that the question of their validity must be raised with respect to their content.

(32) In the light of the foregoing considerations, the Commission, while being aware that the principle of permanent sovereignty over wealth and natural resources applies in the case of *every* people and not only of peoples of newly independent States, nevertheless thought it particularly relevant and necessary to stress that principle in the context of succession of States relating to newly independent States.

Article 15. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

Commentary

(1) In the present draft, the Commission uses the term "uniting of States" in the same sense as it did in the 1974 draft articles on the succession of States in respect of treaties, namely, the "uniting in one State of two or more States, which had separate international personalities at the date of the succession".[178] Article 15 covers the case where one State merges with another State, even if the international personality of the latter continues after they have united. It should thus be distinguished from the case of the emergence of a newly independent State out of two or more dependent territories, or from the case of a dependent territory which

[177] See above, footnote 176.

[178] *Yearbook . . . 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, para. (1) of the commentary to arts. 30 to 32. Cf. 1978 Vienna Convention, art. 31.

becomes integrated or associated with a pre-existing State, which have been dealt with in article 14.

(2) As the Commission wrote in 1974, the succession of States envisaged in the present article does not take account of the particular form of the internal constitutional organization adopted by the successor State:

> The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions . . .
>
> Being concerned only with the uniting of two or more States in one *State*, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope . . . ; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new *State* and do not therefore constitute a succession of *States*.[179]

(3) The formulation in article 15 of the *international* legal rule governing succession to State property in cases of the uniting of States is limited to setting forth a general rule for the passing of State property from the predecessor States to the successor State, while making a provision of *renvoi* to the internal law of the successor State as far as the internal allocation of the property which passes is concerned. Thus, *paragraph 1* states that when two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State, and *paragraph 2* provides that the allocation of the property so passed as belonging to the successor State itself or to its component parts, shall be governed by the internal law of the successor State. Paragraph 2 is, however, qualified by the words "Without prejudice to the provision of paragraph 1", in order to stress the provision of paragraph 1 as the basic international legal rule of the article.

(4) "Internal law" as referred to in *paragraph 2* includes, in particular, the constitution of the State and any other kind of internal legal rules, written or unwritten, including those which effect the incorporation into internal law of international agreements.[180]

Article 16. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property of the predecessor State other than that mentioned in subparagraph (*b*) shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States.

Article 17. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions;

(*c*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(*d*) movable State property of the predecessor State other than that mentioned in subparagraph (*c*) shall pass to the successor States in equitable proportions.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation among the successor States that may arise as a result of a succession of States.

Commentary to articles 16 and 17

(1) *Articles 16 and 17* both deal with cases where part or parts of the territory of a State separate from that State and form one or more individual States. However, article 16 concerns the case of secession of States where the predecessor State continues its existence, while article 17 relates to the case of dissolution of States where the predecessor ceases to exist after the separation of parts of its territory.

(2) It may be recalled that, in its 1972 provisional draft articles on succession of States in respect of treaties, the Commission made a clear distinction between the dissolution of a State and the separation of part of a State, or secession.[181] However, that approach having been disputed by a number of States in their comments on the draft[182] and also by certain representatives in the Sixth Committee at the twenty-eighth session of the

[179] *Ibid.*, paras. (2) and (3) of the commentary.

[180] Examples of such internal law are: the Constitution of the United States of America (1787), art. IV. sect. 3 (*The Constitution of the United States of America (annotated)*, ed. E. S. Corwin, Library of Congress (Washington, D.C., U.S. Government Printing Office, 1953)); the Swiss Constitutions of 1848, art. 33 and of 1874, art. 22 (C. Hilty, *Les Constitutions fédérales de la Confédération Suisse* (Neuchâtel, Attinger, 1891), pp. 451 and 443 (English trans. in *Constitutions of the Countries of the World*, eds. A. P. Blaustein and G. H. Flanz (Dobbs Ferry, Oceana, 1979), vol. XIV)); the Agreement relating to Malaysia of 9 July 1963, sect. 75 (United Nations, *Treaty Series*, vol. 750, p. 59).

[181] *Yearbook . . . 1972*, vol. II, pp. 292 and 295, document A/8710/Rev.1, chap. II, sect. C, arts. 27 and 28.

[182] *Yearbook . . . 1974*, vol. II (Part One), pp. 68-69, document A/CN.4/278 and Add.1-6, paras. 390-391.

General Assembly, the Commission subsequently, in its 1974 draft articles, somewhat modified the treatment of these two cases. While maintaining the theoretical distinction between the dissolution of a State and the separation of parts of a State, it dealt with both cases together in one article from the standpoint of the successor States (art. 33), and at the same time made provision for the case of separation of parts of a State from the standpoint of the predecessor State which continues to exist (art. 34).[183]

(3) With regard to the question of succession in respect of State property, the Commission believes that the distinction between secession and dissolution should be maintained in view of the special characteristics of succession in that sphere. It considers that if the distinction was deemed to be valid for succession in respect of treaties, it is the more so for the purposes of succession in respect of State property. If the predecessor State survives, it cannot be deprived of all its State property; and if it disappears, its State property cannot be left uninherited.

(4) *Subparagraph 1*(a) *of articles 16 and 17* lays down a common rule relating to the passing of immovable State property according to which, unless it is otherwise agreed by the predecessor State and the successor State or, when the predecessor State ceases to exist, by the successor States concerned, immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated. This last wording, which is the one used in article 17, has been modified in article 16 to read: "immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State", which is the formula used in subparagraph 1(*a*) of article 14. As has been explained, the basic rule, with slight variations, has been given for all the categories of succession of States provided for in section 2 of Part II of the draft.[184]

(5) Some examples of relevant State practice can be cited in the present context. With regard to the separation of a part or parts of a State under *article 16*, it should first be noted that before the establishment of the United Nations most examples of secession were to be found among cases of the "secession of colonies", because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State, for according to contemporary international law what we are concerned with is newly independent States resulting from decolonization under the Charter of the United Nations. Since the establishment of the United Nations, there have been at least three cases of secession which were not cases of decolonization: the separation of Pakistan from India, the withdrawal of Singapore from Malaysia, and the secession of Bangladesh. In the case of Pakistan, according to one author, an Expert Committee was appointed on 18 June 1947 to consider the problem of apportionment of the property of British India, and the presumption guiding its deliberations was that "India would remain a constant international person, and Pakistan would constitute a successor State".[185] Thus, Pakistan was regarded as a successor State by a pure fiction. On 1 December 1947, an agreement was concluded between India and Pakistan under which each of the Dominions would become the owner of the immovable property situated in its territory.[186]

(6) An old example of State practice is to be found in the Treaty of 19 April 1839 concerning the Netherlands and Belgium, article XV of which provided as follows:

> Public or private utilities, such as canals, roads or others of a similar nature constructed, in whole or in part, at the expense of the Kingdom of the Netherlands, shall belong, with the benefits and charges attaching thereto, to the country in which they are situated.[187]

The same rule was applied in the case of the Federation of Rhodesia and Nyasaland in 1963, after which "freehold property of the Federation situated in a Territory would vest in the Crown in right of the Territory".[188]

(7) As far as doctrine is concerned, this aspect of State succession, namely, succession through secession or dissolution, has not been given much attention in legal literature. The writings of Sánchez de Bustamante y Sirvén may, however, be cited. On the question of secession, he stated that:

> In the sphere of principles, there is no difficulty about the general principle of the passing of public property, except where the devolution of a particular item is agreed on for special reasons.[189]

He also refers to the draft code of international law by E. Pessoa, article 10 of which provided that "If a State is formed through the emancipation of a province or region, property in the public and private domain situated in the detached territory passes to it".[190] The same author writes on the cases of dissolution of States as follows:

> In cases where a State is divided into two or more States and none of the new States retains or perpetuates the personality of the State which has ceased to exist, the doctrines with which we are already familiar [the principle that property passes to the successor State] must be applied to public and private property which is within the boundaries of each of the new States.[191]

(8) As for immovable State property of the predecessor State situated outside its territory, no specific provision is made in *article 16*, in conformity with the general principle of the passing of State property applied in most of the articles of section 2 of part II of the draft, which requires the geographical location of that State property in the territory to which the succession of States relates. The common rule stated in subparagraph 1(*a*) is, however, tempered in the case of both articles by the provisions of paragraph 3 of article 16

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[183] *Ibid.*, pp. 260-266, document A/9610/Rev.1, chap. II, sect. D, arts. 33 and 34. Cf. 1978 Vienna Convention, arts. 34 and 35.

[184] See above, para. (7) of the introductory commentary to sect. 2.

[185] D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, p. 220.

[186] *Ibid.*

[187] *British and Foreign State Papers, 1838-1839*, vol. XXVII (London, Harrison, 1856), pp. 997-998.

[188] O'Connell, *op. cit.*, p. 230.

[189] A. Sánchez de Bustamante y Sirvén, *Derecho Internacional Público* (Havana, Carasa, 1936), vol. III, p. 292.

[190] *Ibid.*, p. 265.

[191] *Ibid.*, p. 316.

and paragraph 2 of article 17, which reserve any question of equitable compensation that may arise as a result of a succession of States. However, in the case of dissolution of the predecessor State, immovable State property should naturally pass to the successor States. That passing, under article 17, subparagraph 1(*b*), is to be made in "equitable proportions".

(9) The foregoing rule conforms to the opinions of publicists, who generally take the view that the predecessor State, having completely ceased to exist, no longer has the legal capacity to own property and that its immovable property abroad should therefore pass to the successor State or States. It is the successor State which has the better title to such property, having, after all, formed part of the State that has ceased to exist. The question is not that on the extinction of the predecessor State the successor receives the State property of the predecessor because otherwise the property would become abandoned and ownerless. Abandonment of the property, if that is the case, is not the cause for the occurrence of a right of succession; at the most, it is the occasion for it. In any event, in practice, such property is normally apportioned under special agreements between the successor States. Thus, in the Agreement of 23 March 1906 concerning the settlement of economic questions arising in connection with the dissolution of the union between Sweden and Norway, the following provisions are found in article 7:

> The right of occupation of the consular premises in London, which was acquired on behalf of the "Joint Fund for Consulates" in 1877 to have effect until 1945, and which is at present enjoyed by the Swedish Consul-General in London, shall be sold by the Swedish Consulate-General . . . The proceeds of the sale shall be apportioned equally between Sweden and Norway.[192]

(10) In connection with a more recent case, it has been reported that, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, agreements were concluded for the devolution of property situated outside the territory of the union under which Southern Rhodesia was given Rhodesia House in London and Zambia the Rhodesian High Commissioner's house.[193]

(11) *Article 16, subparagraph 1*(b) and *article 17, subparagraph 1*(c) set forth the basic rule relating to movable State property, which is applied consistently throughout section 2 of part II of the draft. It stipulates that movable State property of the predecessor State connected with the activity of that State in respect of the territory (territories) to which the succession relates shall pass to the successor State.[194]

(12) When Pakistan was separated from India under an agreement signed on 1 December 1947, a great deal of equipment, especially arms, was attributed to India, which undertook to pay Pakistan a certain sum to contribute towards the construction of munitions factories.[195] Upon the dissolution of the Federation of Rhodesia and Nyasaland, the assets of the joint institution of issue and gold and foreign exchange reserves were apportioned in proportion to the volume of currency circulating or held in each territory of the predecessor State which became a successor State.[196]

(13) *Article 16, subparagraph 1*(c) and *article 17, subparagraph 1*(d) enunciate a common rule according to which movable State property of the predecessor State other than that connected with the activity of that State in respect of the territory (territories) to which the succession of States relates shall pass to the successor State or States in equitable proportions. The reference to equity, a key element in the material content of the provisions regarding the distribution of property which thus has the character of a rule of positive international law, has already been explained.[197]

(14) The agreement of 23 March 1906 concerning the settlement of economic questions arising in connection with the dissolution of the union between Sweden and Norway contains the following provisions:

> *Article 6.* (*a*) Sweden shall repurchase from Norway its . . . half-share in movable property at legations abroad which was *purchased on joint account.** An expert appraisal of such property shall be made and submitted for approval to the Swedish and Norwegian Ministries of Foreign Affairs.
>
> (*b*) Movable property at consulates which was purchased on joint account shall be apportioned between Sweden and Norway, without prior appraisal, as follows:
>
> There shall be attributed to Sweden the movable property of the consulates-general in . . .
>
> There shall be attributed to Norway the movable property of the consulates-general in . . .[198]

(15) The practice followed by Poland when it was reconstituted as a State upon recovering territories from Austria-Hungary, Germany and Russia was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories it regained or to the acquisition of which those territories had contributed. Poland claimed its share of such property in proportion to the contribution of the territories which it recovered. However, this rule apparently has not always been followed in diplomatic practice. Upon the fall of the Hapsburg dynasty, Czechoslovakia sought the restitution of a number of vessels and tugs for navigation on the Danube. An arbitral award was made.[199] In the course of the proceedings, Czechoslovakia submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subsidy from them, on the ground that these interests had been bought with money

> obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that those countries had contributed thereto in proportion to the taxes paid

[192] E. Descamps and L. Renault, *Recueil international des traités du XX^e^ siècle, 1906* (Paris, Rousseau [n.d.]), pp. 861-862.

[193] O'Connell, *op. cit.*, p. 231.

[194] See above, para. (11) of the introductory commentary to sect. 2.

[195] O'Connell, *op. cit.*, p. 220-221.

[196] *Ibid.*, p. 196.

[197] See above, paras. 76-85.

[198] Descamps and Renault, *op. cit.*, pp. 860-861.

[199] Case of the *cession of vessels and tugs for navigation on the Danube*, Allied Powers (Czechoslovakia, Greece, Romania, Serb-Croat-Slovene Kingdom) *v.* Austria, Bulgaria, Germany and Hungary (Decision: Paris, 2 August 1921; Arbitrator: Walker D. Hines (USA)). See United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948. V.2), pp. 97-212.

by them, and were therefore to the same proportionate extent the owners of the property.[200]

The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czecho-Slovakia the right to State property except to such property situated in Czecho-Slovakia".[201] The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of the passing of public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

(16) *Article 16, paragraph 2*, states that the rules enunciated in paragraph 1 of the same article apply when part of the territory of a State separates from that State and unites with another State. Reference to this provision has already been made in the commentary to article 13,[202] where the case concerned is distinguished from that covered by the provisions of article 13, namely, the transfer of part of the territory of a State. In the 1974 draft articles on succession in respect of treaties, the situations covered by paragraph 2 of article 16 and by article 13 were dealt with in a single provision,[203] since the question there was the applicability to both cases of the same principle of treaty law, that of moving treaty-frontiers. In the context of succession of States in respect of State property, archives and debts, however, there are differences between the two situations which call for regulation by means of separate legal provisions. These differences are connected principally with whether or not it is necessary to consult the population of the territory to which the succession of States relates, depending on the size of the territory and of its population and, in consequence, its political, economic and strategic importance, and also with the fact of the usually politically charged circumstances that surround the succession of States in the case to which paragraph 2 of article 16 relates. As was explained above,[204] the differences which ensue in the legal sphere are of two kinds: first, in the case covered by article 16, paragraph 2, where part of the territory of a State separates from that State and unites with another State, the agreement between the predecessor State and the successor State is not given the pre-eminent role it has under article 13, which is concerned with the transfer of part of the territory of a State to another State. Secondly, by contrast with article 13, article 16 provides for the passing to the successor State of a third category of movable State property, namely, movable State property of the predecessor State other than that connected with the activity of that State in respect of the territory to which the succession of States relates.

(17) Lastly, *article 16, paragraph 3* and *article 17, paragraph 2* lay down the common rule that the general rules contained in these articles are without prejudice to any question of equitable compensation that may arise as a result of a succession of States. There is a further example, in section 2, of a rule of positive international law incorporating the concept of equity, to which reference has already been made.[205] It is intended to ensure a fair compensation for any successor State, as well as any predecessor State which would be deprived of its legitimate share as a result of the exclusive attribution of certain property either to the predecessor State or to the successor State or States. For example, there may be cases where all or nearly all the immovable property belonging to the predecessor State is situated in that part of its territory which later separates to form a new State, although such property was acquired by the predecessor State with common funds. If, under subparagraph 1(*a*) of articles 16 and 17, such property were to pass to the successor State in the territory of which it is situated, the predecessor might be left with little or no resources permitting it to survive as a viable entity. In such a case, the rule contained in article 16, paragraph 3, and article 17, paragraph 2, should be applied in order to avoid this inequitable result.

PART III
STATE ARCHIVES

General commentary

(1) The Commission considers that, even if State archives may be treated as a type of State property, they constitute a very special case in the context of succession of States. The principle of the transfer of State property taken *in abstracto* applies to all property, whether movable or immovable, and is readily applicable to concrete situations involving the transfer of such property as administrative premises or buildings of the State, barracks, arsenals, dams, military installations, all kinds of research centres, factories, manufacturing facilities, railway equipment, including both rolling stock and fixed installations, airfields, including their movable and immovable equipment and installations, claims outstanding, funds, currency, etc. By virtue of their nature, all these forms of State property are susceptible of appropriation and, hence, of assignment to the successor State, as appropriate, in accordance with the rules on succession of States. Such is not necessarily the case with archives, which, by virtue of their physical nature, their contents, and the function which they perform, may seem to be of interest at one and the same time both to the predecessor State and to the successor State. A State building situated in the territory to which the succession of States relates can only pass to the successor State or, where there is more than one successor State, to the successor States in equitable proportions. Similarly, monetary reserves, such as gold, for example, can be transferred *physically* to the successor State, or apportioned between the

[200] *Ibid.*, p. 120.

[201] *Ibid.*, pp. 120-121. The reference was to art. 208 of the Treaty of Saint-Germain-en-Laye (see footnote 111 above) and art. 191 of the Treaty of Trianon (see footnote 113 above).

[202] See above, paras. (5), (9) and (10) of the commentary to art. 13.

[203] Art. 14, which corresponds to art. 15 of the 1978 Vienna Convention.

[204] See above, paras. (9) and (10) of the commentary to art. 13.

[205] See above, paras. 76 to 85.

predecessor State and the successor State, or among several successors, if one or the other solution is agreed upon by the parties. There is nothing in the physical nature of State property of this kind that would stand in the way of any solution that is agreed upon by the States concerned.

(2) Archives, by contrast, may prove to be indispensable both to the successor State and to the predecessor State, and owing to their nature they cannot be divided or split up. However, State archives are objects which have the peculiarity of being reproducible, which is not true of the other immovable and movable property involved in the succession of States. Of all State property, archives alone are capable of being duplicated, which means that both the right of the successor State to recover the archives and the interest of the predecessor State in their use can be satisfied.

(3) This point should be stressed even more in the contemporary setting where the technological revolution has made it possible to reproduce documents of almost any kind with extreme speed and convenience.

(4) Archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the "ins and outs" of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. According to a group of experts convened by UNESCO in March 1976,

> Archives are an essential part of the heritage of any national community. Not only do they provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights.[206]

(5) The destructive effects of wars have seriously impaired the integrity of archival collections. In some cases, the importance of documents is such that the victor hastens to transfer these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the spoliation of its records. All, or almost all, annexation treaties in Europe since the Middle Ages have required the conquered to restore the archives belonging to or concerning the ceded territory. Without being under any delusion as to the draconian practice of the victors who carried off archives and recklessly disrupted established collections, legal doctrine considered clauses calling for the handing over of archives to the annexing State as implicit in the few treaties from which they had been omitted.[207] These practices have been followed in all periods and in all countries. The fact is that archives handed over to the successor State —forcibly, if necessary—served primarily as evidence and as "title deeds" to the annexed territory; they were used as instruments for the administration of the territory, and are so used even more today.

(6) Reflecting the importance of archives in domestic affairs as well as in international relations, disputes have never ceased to occur regarding State archives, and numerous agreements have been concluded for their settlement.[208]

(7) From an analysis of State practice, as reflected in such agreements, a number of conclusions can be drawn, as has been done by one writer,[209] which can be summarized as follows:

(*a*) Archival clauses are very common in treaties on the cession of territories concluded between European Powers and are almost always absent in cases of decolonization.

(*b*) The removal of archives is a universal and timeless phenomenon. In almost all cases, they are returned sooner or later to their rightful owners, except, it seems, in cases of decolonization. But time has not yet run its full course to produce its effect in this field.

(*c*) Archives of an administrative or technical nature concerning the territory affected by the succession of States pass to the successor State in all categories of State succession and, generally, without much difficulty.

(*d*) Archives of an historical nature pass to the successor State, depending to some extent on the circumstances; archivists cannot always explain their transfer to the successor State nor, in the converse case, can jurists explain why they are kept by the predecessor State.

(8) With regard to the first conclusion, practically all treaties on the transfer of territory concluded in Europe since the Middle Ages contain special, and often very precise, clauses concerning the treatment of the archives of the territories to which the succession of States relates.[210] The categories of State succession dealt with in such treaties are, by and large, according to the categorization of succession established by the Commission, the transfer of part of the territory of one State to another State and the separation of one or more parts of the territory of a State.

(9) In modern cases of decolonization, on the other hand, very few treaty provisions exist regarding the treatment of archives, despite the large number of newly independent States. The absence of archival clauses from agreements relating to the independence of colonial territories seems the more surprising as

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[206] UNESCO, "Final report of consultation group to prepare a report on the possibility of transferring documents from archives constituted within the territory of other countries" (CC-76/WS/9), p. 2. The meeting was held in co-operation with the International Council on Archives.

[207] L. Jacob, *La clause de livraison des archives publiques dans les traités d'annexion* (Paris, Giard et Brière, 1915) [thesis], *passim*, and in particular pp. 40 and 49.

[208] For a non-exhaustive table of treaties and conventions containing provisions relating to the passing of archives in cases of succession of States since 1600, see *Yearbook . . . 1979*, vol. II (Part One), pp. 88 et *seq.*, document A/CN.4/322 and Add.1 and 2.

[209] See C. Kecskemeti, "Archival claims: Preliminary study on the principles and criteria to be applied to negotiations", UNESCO document PGI-77/WS/1, reproduced in: Conseil international des archives, *Actes de la dix-septième Conférence internationale des archives: Constitution et reconstitution des patrimoines archivistiques nationaux* (Paris, Imprimerie nationale, 1980). This study eventually constituted the substance of the UNESCO document entitled "Report of the Director-General on the study regarding problems involved in the transfer of documents from archives in the territory of certain countries to the country of their origin" (document 20 C/102, of 24 August 1978).

[210] Jacob, *op. cit.*

these agreements, of which there are many, govern succession not only to immovable but also to movable property, i.e. property of the same type as the archives themselves.[211]

(10) There may be many reasons for this. For example, decolonization cannot be total and instantaneous *ab initio*; rather, at least to begin with, it is purely nominal and only gradually acquires more substance and reality, so that the question of archives seldom receives priority treatment during the early, almost inevitably superficial, stage of decolonization. Newly independent States are plunged straight away into day-to-day problems, and have to cope with economic or other priorities which absorb all their attention and prevent them from perceiving immediately the importance of archives for their own development. Moreover, the underdevelopment inherited in all fields by newly independent States is also reflected precisely in an apparent lack of interest in the exercise of any right to the recovery of archives. Lastly, the power relationship existing between the former administering Power and the newly independent State most often enables the former to evade the question of the passing of archives and to impose unilateral solutions in this matter.

(11) In view of the above-mentioned historical background, the Commission wishes to emphasize the importance of close co-operation among States for settling archival disputes, taking into account especially the relevant recommendations of international organizations such as UNESCO, which reflect the contemporary demands of States concerning their right to archives and their cultural heritage.[212] The predecessor and successor States should be under a duty to negotiate in good faith and with unimpeachable determination to reach a satisfactory settlement of such disputes. As the Director-General of UNESCO has said,

> Because the patrimonial character of archives as State property derives from the basic sovereignty of the State itself, problems involved in the ownership and transfer of State archives are fundamentally legal in character. Such problems should therefore be resolved primarily through bilateral or multilateral negotiations and agreements between the States involved.[213]

SECTION 1. INTRODUCTION

Article 18. Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State archives.

Commentary

The present article corresponds to article 7 of Part II on State property and reproduces its wording, with the necessary replacement of the word "property" by the word "archives". Its purpose is to make clear that Part III of the draft deals specifically with State archives, as defined in the following article. As has already been indicated,[214] although State archives may be regarded as State property, they constitute a very special case in the context of succession of States. State archives have their own intrinsic characteristics which in turn, impart a specific nature to the disputes they give rise to and call for special rules. In order to give better assistance in resolving such disputes between States, appropriate rules have been drafted in the present part which are more closely adapted to the specific cases envisaged.

Article 19. State archives

For the purposes of the present articles, "State archives" means all documents of whatever kind which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been kept by it as archives.

Commentary

(1) Article 19 defines the term "State archives" as used in the present articles. It means "all documents of whatever kind" which fulfil two conditions. First, the documents must have "belonged to the predecessor State according to its internal law" and second, they must have "been kept by [the predecessor State] as archives". The first condition thus follows the formula of *renvoi* to internal law adopted for article 8, defining the term "State property". The second condition, however, is not qualified by the words "according to its internal law". By detaching this second element from the internal law of a State, the Commission attempted to avoid an undesirable situation where certain predecessor States could exclude the bulk of public papers of recent origin—the "living archives"—from the ap-

[211] There are very many treaties relating to the transfer of judicial archives in cases of decolonization. However, such cases involve the transfer of judicial records of litigation still under adjudication in courts of appeal or cassation situated in the territory of the former administering Power and involving nationals of the newly independent State. The predecessor State cannot continue to adjudicate cases henceforward falling under the judicial sovereignty of the successor State. Many agreements on this subject could be cited. See, for example, as regards France and the newly independent territories: Agreement concerning the transitional provisions in respect of justice between France and the Central African Republic of 12 July 1960 (*Journal Officiel de la République française, Lois et décrets* (Paris), 92nd year, No. 176 (30 July 1960), p. 7043, and *Materials on Succession of States in respect of Matters other than Treaties* (United Nations publication, Sales No. E/F.77.V.9), p. 150); Agreement between France and Chad of the same date (*Journal officiel . . .*, p. 7044, and *Materials . . .*, p. 157); Agreement between France and the Congo of the same date (*Journal officiel . . .*, p. 7043, and *Materials . . .*, p. 163); Agreement between France and Gabon of 15 July 1960 (*Journal officiel . . .*, p. 7048, and *Materials . . .*, p. 182); Agreement between France and Madagascar of 2 April 1960 (*Journal officiel . . .*, 92nd year, No. 153 (2 July 1960), p. 5968, and *Materials . . .*, p. 290); Agreement between France and the Federation of Mali of 4 April 1960 (*Journal officiel . . .*, p. 5969, and *Materials . . .*, p. 315); exchange of letters between France and Upper Volta of 24 April 1961 relating to the transfer of records pertaining to cases pending in the Conseil d'Etat and the Court of Cassation (*Journal officiel . . .*, 94th year, No. 30 (5-6 February 1962), p. 1315, and *Materials . . .*, p. 439); exchange of letters between France and Dahomey of 24 April 1961 (*Journal officiel . . .*, p. 1285, and *Materials . . .*, p. 128); exchange of letters between France and Mauritania of 19 June 1961 (*Journal officiel . . .*, p. 1335, and *Materials . . .*, p. 343); exchange of letters between France and Niger of 24 April 1961 (*Journal officiel . . .*, p. 1306, and *Materials . . .*, p. 372); exchange of letters between France and the Ivory Coast of 24 April 1961 (*Journal officiel . . .*, p. 1269, and *Materials . . .*, p. 231); and others.

[212] Further on this point, see below, paras. (27) *et seq.* of the commentary to art. 26.

[213] UNESCO, document 20 C/102, para. 19 (see footnote 20 above).

[214] See above, para. (1) of the general commentary to this Part.

plication of the present articles simply because they are not designated under their domestic law as "archives". It should be pointed out that in a number of countries such "living archives" are not classified as "archives" until a certain time, for example twenty or thirty years, has elapsed.

(2) Although in archival science "archives" are generally taken to mean:

(*a*) the documentary material amassed by institutions or natural or legal persons in the course of their activities and deliberately preserved; (*b*) the institution which looks after this documentary material; (*c*) the premises which house it,[215]

the present articles deal with "all documents of whatever kind", corresponding to only (*a*) of those three categories. The other categories, namely, the custodial institutions and the premises, are considered as immovable property and thus fall into part II of the present draft.

(3) The word "documents" (of whatever kind) should be understood in its widest sense. An archival document is anything which contains "authentic data which may serve scientific, official and practical purposes", according to the reply of Yugoslavia to the questionnaire drawn up by the International Round Table Conference on Archives.[216] Such documents may be in written form or unwritten, and may be in a variety of material, such as paper, parchment, fabric, stone, wood, glass, film, etc.

(4) Of course, the preservation of written sources remains the very basis for the constitution of State archives, but the criterion of the physical appearance of the object, and even that of its origin, play a part in the definition of archival documents. Engravings, drawings and plans which include no "writing" may be archival items. Numismatic pieces are sometimes an integral part of archives. Quite apart from historic paper money, or samples or dies or specimens of bank notes or stamps, there are even coins in national archives or national libraries. This is the case in Romania, Italy, Portugal, the United Kingdom (where the Public Record Office owns a collection of stamps and counterfeit coins) and France (where the Bibliothèque nationale, in Paris, houses a large numismatic collection from the Cabinet des médailles). Iconographic documents, which are normally kept in museums, are sometimes kept in national archival institutions, most frequently because they belong to archives. Iconographic documents which have to do with important persons or political events are filed and cared for as part of the national archives. This is the case in the United Kingdom, where the Public Record Office has a large number of iconographic documents as well as a large series of technical drawings from the Patent Office Library; in Italy, where the Archivio centrale dello Stato keeps photographs of all political, scientific and ecclesiastical notables; and in Argentina, where the Archivo gráfico fulfils the same function. Photographic prints are part of the archives themselves in certain countries. Thus, in Poland, the national archives receive prints from State photographic agencies. Some sound documents and cinematographic films are considered to be "archives" under the law of many countries (for example, France, Sweden, Czechoslovakia) and are therefore allocated under certain conditions either to the State archival administration, or to libraries or museums, or to other institutions. In cases where they are allocated to the State archival administration, sound documents must be considered an integral part of the archives and must be treated in the same way as the latter in the case of succession of States. In the United States, commercial films are subject to copyright and are registered with the Library of Congress, whereas cinematographic productions by the army and certain American public institutions are placed in the State archives. In Finland, a committee chaired by the director of the national archives is responsible for the establishment and preservation of cinematographic archives.[217]

(5) The term "documents of whatever kind" is intended to cover documents of whatever subject-matter —diplomatic, political, administrative, military, civil, ecclesiastical, historical, geographical, legislative, judicial, financial, fiscal, cadastral, etc.; of whatever nature—handwritten or printed documents, drawings, photographs, their originals or copies, etc.; of whatever material—paper, parchment, stone, wood, ivory, film, wax, etc.; and of whatever ownership, whether forming part of a collection or not.

(6) The term "documents of whatever kind", however, excludes *objets d'art* as such and not as archival pieces which may also have cultural and historical value. The passing of such objects is covered either by the provisions relating to State property or is dealt with as the question of their return or restitution, rather than as a problem of State succession.

(7) Various wordings have been used in diplomatic instruments to refer to archives falling under the present article. Examples are "archives, registers, plans, title deeds and documents of every kind",[218] "the archives, documents and registers relating to the civil, military, and judicial administration of the ceded territories",[219] "all title deeds, plans, cadastral and other registers and papers",[220] "any government archives, records, papers or documents which relate to the ces-

[215] Direction des archives de France, *Actes de la septième Conférence internationale de la Table ronde des archives : Le concept d'archives et les frontières de l'archivistique* (Paris, Imprimerie nationale, 1963), p. 9.

[216] *Ibid.*, p. 10.

[217] *Ibid.*, pp. 30-31, for other examples.

[218] This expression appears in several clauses of the Treaty of Versailles of 28 June 1919: part III, sect. I, art. 38, concerning Germany and Belgium; sect. V, art. 52, concerning Germany and France in respect of Alsace-Lorraine; sect. VIII, art. 158, concerning Germany and Japan in respect of Shantung (*British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, pp. 29-30; 42 and 81), as well as in the Treaty of Saint-Germain-en-Laye of 10 September 1919: art. 93, concerning Austria (*ibid.*, p. 361); and in the Treaty of Trianon of 4 June 1920: art. 77, concerning Hungary (*ibid.*, *1920* (1923), vol. CXIII, p. 518).

[219] Art. III of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 (*ibid.*, *1871-1872* (London, Ridgway, 1877), vol. LXII, p. 78; English trans. in *The Great European Treaties of the Nineteenth Century*, eds. A. Oakes and R. B. Mowat (Oxford, Clarendon Press, 1970), p. 280).

[220] Art. 8 of the Additional Agreement of the Treaty of Peace signed at Frankfurt on 11 December 1871 (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1875), vol. XX, p. 854).

sion or the rights and property of the inhabitants of the islands ceded";[221] "all documents exclusively referring to the sovereignty relinquished or ceded . . ., the official archives and records, executive as well as judicial",[222] "documents, deeds and archives . . ., registers of births, marriages and deaths, land registers, documents or cadastral papers . . .",[223] and so forth.

(8) A most detailed definition of "archives" is to be found in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia,[224] concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses historical and cultural archives as well as administrative archives, and among the latter category, documents relating to all the public services, to the various parts of the population, and to categories of property situations or private juridical relations. Article 2 reads as follows:

> The expression "archives and documents of an administrative character" shall be construed as covering the documents of the central administration and those of the local public administrative authorities.
>
> The following [in particular shall be covered] . . .:
>
> Documents . . . such as cadastral registers, maps and plans; blueprints, drawings, drafts, statistical and other similar documents of technical administration, concerning *inter alia* the public works, railways, mines, public waterways, seaports and naval dockyards;
>
> Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practise certain professions;
>
> Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities . . .;
>
> The expression "historical archives and documents" shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest.

(9) It should be noted that no absolute distinction exists between "archives" and "libraries". While archives are generally thought of as documents forming part of an organic whole and libraries as composed of works which are considered to be isolated or individual units, it is nevertheless true that archival documents are frequently received in libraries and, conversely, library items are sometimes taken into the archives. The inclusion of library documents in archives is not confined to rare or out-of-print books, which may be said to be "isolated units", or to manuscripts, which by their nature are "isolated units". Conversely, libraries acquire or receive as gifts or legacies the archives of important persons or statesmen. There are therefore certain areas in which archives and libraries overlap, and these are extended by the system of the statutory deposit of copies of printed works (including the press) in certain countries, and by the fact that the archival administration sometimes acts as the author or publisher of official publications.

(10) Similarly, "archives" and "museums" cannot be placed in completely separate categories; some archives are housed in museums and various museum pieces are found in archives. According to Yves Pérotin:

> . . . in England, it is considered normal that archival documents connected with museographical collections should follow the latter and conversely that certain objects (such as chests) should be treated in the same way as papers; . . . local museums own archival documents that have been bought or received as gifts, or come from learned societies . . . In the Netherlands, historical atlases are cited as an example of documents legitimately kept in museums, while dies of seals are kept in the archives. In the *Land* of Westphalia, reference is made to chests and other objects which by their nature belong to the archives . . . in the USSR, collections of manuscript documents provisionally kept in the national museums are supervised by the Archives Administration; the major autonomous "archive museums", established by special decision (Gorky, Mendeleev, etc.) are not exempt.
>
> . . . in Portugal, the Viseu regional museum keeps some of the parchments from the cathedral chapter of the See, and the remainder are in the district archives or in Lisbon in the Torre do Tombo . . . In Turkey, . . . the archives of the palace of the former sultans are kept in the Topkapi-Sarayi museum with part of the records of the religious courts, whereas the provincial counterparts of those records are, in exactly nineteen cases, kept in museums."[225]

Article 20. Effects of the passing of State archives

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

Article 21. Date of the passing of State archives

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

Article 22. Passing of State archives without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives from the predecessor State to the successor State shall take place without compensation.

Article 23. Absence of effect of a succession of States on the archives of a third State

A succession of States shall not as such affect State archives which, at the date of the succession of States, are

[221] Art. 1, para. 3, of the Convention between the United States of America and Denmark for the cession of the Danish West Indies, signed at New York on 4 August 1916 (*Supplement to the American Journal of International Law, 1917* (New York, Oxford University Press), vol. 11, p. 55).

[222] Art. VIII of the Treaty of Peace between Spain and the United States of America, signed at Paris on 10 December 1898 (W. M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers* (Washington, D.C., U.S. Government Printing Office, 1910), vol. II, p. 1693).

[223] Art. 8 of the Frontier Treaty between the Netherlands and the Federal Republic of Germany signed at The Hague on 8 April 1960 (United Nations, *Treaty Series*, vol. 508, p. 154).

[224] Agreement signed at Rome on 23 December 1950 between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (*ibid.*, vol. 171, pp. 293 and 295).

[225] Direction des archives de France, *Le concept d'archives . . . (op. cit.)*, pp. 45-46.

situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Commentary to articles 20, 21, 22 and 23

(1) Having decided to devote a separate part to State archives, the Commission found it appropriate to include in section 1 a few introductory articles by way of general provisions, in keeping with the example followed in the parts relating to State property and State debts, in order to accentuate the specificity of the subject of State archives in relation to that of State property. With a view to avoiding the creation of too great a difference between the two sets of general rules, the provisions concerning archives in section 1 of part III have been drafted in identical terms to those used in the corresponding articles of section 1 of part II on State property, except that the word "property" has been replaced by the word "archives". In this manner, a perfect correspondence has been achieved between the two sets of articles, as follows: articles 18 and 7 (as was already explained in the commentary to article 18); articles 20 and 9; articles 21 and 10; articles 22 and 11; and articles 23 and 12.

(2) Article 20 calls for no special comments. As regards article 21, it may at first sight appear ill-advised to provide that State archives shall pass on the date of the succession of States. It may even be thought unreasonable, unrealistic and illusive, inasmuch as archives generally need sorting in order to determine what shall pass to the successor State, and that sometimes requires a good deal of time. In reality, however, archives are usually well identified as such and quite meticulously classified and indexed. They can be transferred immediately. Indeed, State practice has shown that this is possible. The *"immediate"* transfer of the State archives due to the successor State has been specified in numerous treaties. Article 93 (concerning Austria) of the Treaty of Saint-Germain-en-Laye, of 10 September 1919, article 77 (concerning Hungary) of the Treaty of Trianon, of 4 June 1920, and articles 38 and 52 (concerning Belgium and France) of the Treaty of Versailles, of 28 June 1919,[226] provided that the archives in question should be transferred *"without delay"*. Provision was also made for the *"immediate"* transfer of archives in General Assembly resolution 388 (V) of 15 December 1950, concerning the position of Libya as a successor State (art. 1, subpara. (2)*(a)*).

(3) It is, furthermore, necessary to make the date for the passing of State archives the date of the succession of States, even if delays are granted *in practice* for copying, microfilming, sorting or inventory purposes. It is essential to know that the date of the succession is the date on which the successor State becomes the owner of the archives that pass to it, even if practical considerations delay the actual transfer of those archives. It must be made clear that, should a further succession of States affecting the predecessor State occur in the meanwhile, the State archives that were to pass to the successor State in connection with the first succession of States are not affected by the second such event, even if there has not been enough time to effect their physical transfer.

(4) Lastly, it should be pointed out that the rule concerning the passing of the archives on the date of the succession of States is tempered in article 21 by the possibility open to States at all times to agree on some other solution and by the allowance made for whatever may be "decided"—for example, by an international court—contrary to the basic rule. As a matter of fact, quite a number of treaties have set aside the rule of the immediate passing of State archives to the successor State. Sometimes the agreement has been for a period of *three months* (as in art. 158 of the Treaty of Versailles[227]) and sometimes *"within eighteen months"* (as in art. 37 of the Treaty of Peace with Italy of 10 February 1947,[228] which required Italy to return within that period the archives and cultural or artistic objects "belonging to Ethiopia or its nationals"). It has also been stipulated that the question of the handing over of archives should be settled by agreement *"so far as is possible within a period of six months"* following the entry into force of [the] Treaty" (art. 8 of the Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany concerning various frontier areas).[229] One of the most precise provisions concerning time-limits is article 11 of the Treaty of Peace with Hungary, of 10 February 1947:[230] it sets out a veritable calendar for action within a period of *eighteen months*. In some instances, the setting of a time-limit has been left to a joint commission entrusted with identifying and locating the archives which should pass to the successor State and with arranging their transfer.

(5) Article 22 refers only to "compensation", or reparation in cash or in kind (provision of property or of a collection of archives in exchange for the property or achives that pass to the successor State); but the notion must be understood broadly, in the sense that it not only precludes all compensation but also exonerates the successor State from the payment of taxes or dues of whatever nature. In this case, the passing of the State property or archives is truly considered as occurring *"by right"*, entirely free and without compensation. Article 22 is justified by the fact that it reflects clearly established State practice. Furthermore, the principle of non-compensation is implicitly confirmed in the later articles of this part, which provide that the cost of making *copies* of archives shall be borne by the requesting State.

(6) The Commission, having decided to retain article 12 in the draft, found it only appropriate to include article 23 as its counterpart, in the part on State archives. As regards article 23, two eventualities are conceivable. The first is that in which the archives of a third State are housed for some reason within a predecessor State. For example, the third State might be at war with another State and have deposited valuable archives for safekeeping within the territory of the State where a succession of States occurs. Again, it might simply

[226] For the references to these treaties, see footnote 218 above.

[227] *Idem.*

[228] United Nations, *Treaty Series*, vol. 49, p. 142.

[229] *Ibid.*, vol. 508, p. 154.

[230] *Ibid.*, vol. 41, p. 178.

have entrusted part of its archives for some time, for example, for restoration or for a cultural exhibition, to a State where a succession of States supervenes. The second eventuality is that in which a successor State to which certain State archives should pass fails, for extraneous reasons, to have them handed over immediately or within the agreed time-limit. If a second succession of States affecting the same predecessor State occurs in the interim, the successor State from the first succession will be considered as a third State in relation to that second succession; those of its archives situated within the territory of the predecessor State which it has not by then recovered must remain unaffected by the second succession.

Article 24. Preservation of the unity of State archives

Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the unity of State archives.

Commentary

The Commission, on second reading, decided to include in a separate article the provision originally contained in paragraph 6 of article 29 as adopted on first reading, relating to the preservation of the unity of State archives. The reference to the preservation of the unity of State archives reflects the principle of indivisibility of archives, which underlies the questions of succession to documents of whatever kind that constitute such State archives, irrespective of the specific category of succession of States involved. Article 24, therefore, provides for a safeguard in the application of the substantive rules stated in the articles constituting section 2 of the present part.

SECTION 2. PROVISIONS CONCERNING SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Article 25. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

Commentary

(1) The present article concerns the passing of State archives in the case of transfer of part of the territory of a State to another. The practice of States in this case of succession to State archives is somewhat suspect, inasmuch as it has relied on peace treaties that were generally concerned with providing political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions. It had long been the traditional custom that the victors took archives of the territories conquered by them and sometimes even removed the archives of the predecessor State.

(2) Without losing sight of the above-stated fact, the existing State practice may, nevertheless, be used in support of the proposals for more equitable solutions which are embodied in the text of this article. That practice is referred to in the present commentary under the following six general headings: (*a*) transfer to the successor State of all archives relating to the transferred territory; (*b*) archives removed from or constituted outside the territory of the transferred territory; (*c*) the "archives-territory" link; (*d*) special obligations of the successor State; (*e*) time-limits for handing over the archives; and (*f*) State libraries.

Transfer to the successor State of all archives relating to the transferred territory

(3) Under this heading, it is possible to show the treatment of the sources of archives, archives as evidence, archives as instruments of administration, and archives as historical fund or cultural heritage.

(4) The practice on sources of archives, about which there seems to be no doubt, originated a long time ago in the territorial changes carried out as early as the Middle Ages. It is illustrated by examples taken from the history of France and Poland.[21] In France, in 1194, King Philippe-Auguste founded his "Repository of Charters", which constituted a collection of the documents relating to his kingdom. When in 1271 King Philippe III inherited the lands of his uncle, Alphonse de Poitiers (almost the entire south of France), he immediately transferred to the Repository the archives relating to these lands: title deeds to land, chartularies, letter registers, surveys and administrative accounts. This practice continued over the centuries as the Crown

[21] See Direction des archives de France, *Actes de la sixième Conférence internationale de la Table ronde des archives : Les archives dans la vie internationale* (Paris, Imprimerie nationale, 1963), pp. 12 *et seq.*

acquired additional lands. The same happened in Poland, from the fourteenth century onwards, during the progressive unification of the kingdom by the absorption of the ducal provinces: the dukes' archives passed to the King along with the duchies. Thus, the transfer principle was being applied a very long time ago, even though, as will be seen, the reasons for invoking it varied.

(5) Under the old treaties, archives were transferred to the successor State primarily as evidence and as titles of ownership. Under the feudal system, archives represented a legal title to a right. That is why the victorious side in a war made a point of removing the archives relating to their acquisitions, taking them from the vanquished enemy by force if necessary: their right to the lands was guaranteed only by the possession of the "terriers". An example of this is provided by the Swiss Confederates who in 1415 *manu militari* removed the archives of the former Habsburg possessions from Baden Castle.[232]

(6) As from the sixteenth century, it came to be realized that, while archives constituted an effective legal title, they also represented a means of administering the country. It then became the accepted view that, in a transfer of territory, it was essential to leave to the successor as viable a territory as possible in order to avoid any disruption of management and facilitate proper administration. Two possible cases may arise.

The first is that of a single successor State. In this case, all administrative instruments are transferred from the predecessor State to the successor State, the said instruments being understood in the broadest sense: fiscal documents of all kinds, cadastral and domanial registers, administrative documents, registers of births, marriages and deaths, land registers, judicial and prison archives, etc. Hence it became customary to leave in the territory all the written, pictorial and photographic material necesary for the continued smooth functioning of the administration. For example, in the case of cession of the provinces of Jämtland, Härjedalen, Gotland and Ösel, the Treaty of Brömsebro of 13 August 1645 between Sweden and Denmark provided that all judicial deeds, registers and cadastres (art. 29), as well as all information concerning the fiscal situation of the ceded provinces must be delivered to the Queen of Sweden. Similar provisions were subsequently accepted by the two Powers in their peace treaties of Roskilde, 26 February 1658 (art. 10), and Copenhagen, 27 May 1660 (art. 14).[233] Article 69 of the Treaty of Münster between the Netherlands and Spain of 30 January 1648 provided that "all registers, maps, letters, archives and papers, as well as judicial records, concerning any of the United Provinces, associated regions, towns . . . which exist in courts, chancelleries, councils and chambers . . . shall be delivered . . .".[234] Under the Treaty of Utrecht of 11 April 1713, Louis XIV ceded Luxembourg, Namur and Charleroi to the (Dutch) States General "with all papers, letters, documents and archives relating to the said Low Countries".[235] In fact, almost all treaties concerning the transfer of part of a territory contain a clause relating to the transfer of archives, and for this reason it is impossible to list them all. Some treaties are even accompanied by a separate convention dealing solely with this matter. Thus, the Convention between Hungary and Romania signed at Bucharest on 16 April 1924,[236] which was a sequel to the peace treaties marking the end of the First World War, dealt with the exchange of judicial records, land registers and registers of births, marriages and deaths, and specified how the exchange was to be carried out.

(7) In the second case, there is more than one successor State. The examples given below concern old and isolated cases and cannot be taken to indicate the existence of a custom, but it is useful to mention them because the approach adopted would today be rendered very straightforward through the use of modern reproduction techniques. Article 18 of the Barrier Treaty of 15 November 1717 concluded between the Holy Roman Empire, Great Britain and the United Provinces provides that the archives of the dismembered territory, namely, Gelderland, would not be divided up among the successor States, but that an inventory would be drawn up, one copy of which would be given to each State, and the archives would remain intact and at their disposal for consultation.[237] Similarly, article VII of the Territorial Treaty between Prussia and Saxony of 18 May 1815 refers to "deeds and papers which . . . are of common interest to both parties".[238] The solution adopted was that Saxony would keep the originals and provide Prussia with certified copies. Thus, regardless of the number of successors, the entire body of archives remained intact in pursuance of the principle of the conservation of archives for the sake of facilitating administrative continuity. However, this same principle and this same concern were to give rise to many disputes in modern times as a result of a distinction made between administrative archives and historical archives.

According to some writers, administrative archives must be transferred to the successor State in their entirety, while so-called historical archives in conformity with the principle of the integrity of the archival collection must remain part of the heritage of the predecessor State unless established in the territory being transferred through the normal functioning of its own institutions. This argument, although not without merit, is not altogether supported by practice: history has seen many cases of transfers of archives, historical documents included. For example, article XVIII of the Treaty of Vienna of 3 October 1866, by which Austria ceded Venezia to Italy, for the transfer to Italy of all "title deeds, administrative and judicial documents . . ., political and historical documents of the former Republic of Venice", while each of the two parties

[232] As these archives concerned not only the Confederates' territories but also a large part of southwest Germany, the Habsburgs of Austria were able to recover the archives not concerned with Confederate territory in 1474.

[233] See Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, p. 16.

[234] *Ibid.*

[235] *Ibid.*, p. 17.

[236] League of Nations, *Treaty Series*, vol. XLV, p. 331.

[237] See Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, pp. 17-18.

[238] *British and Foreign State Papers, 1814-1815* (London, Ridgway, 1839), vol. II, p. 87.

undertakes to allow the others to copy "historical and political documents which may concern the territories remaining in the possession of the other Power and which, in the interests of science, cannot be separated from the archives to which they belong".[239] Other examples of this are not difficult to find. Article 29, paragraph 1, of the Peace Treaty between Finland and Russia signed at Dorpat on 14 October 1920:

> The Contracting Powers undertake at the first opportunity to restore the Archives and documents which belong to public authorities and institutions which may be within their respective territories, and which refer entirely or mainly to the other Contracting Power or its history.[240]

Archives removed from or constituted outside the transferred territory

(8) There would seem to be ample justification for accepting, as adequately reflecting the practice of States, the rule whereby the successor State is given all the archives, historical or other, relating to the transferred territory, even if these archives have been removed from or are situated outside this territory. The Treaties of Paris of 1814 and of Vienna of 1815 provided for the return to their place of origin of the State archives that had been gathered together in Paris during the Napoleonic period.[241] Under the Treaty of Tilsit of 7 July 1807, Prussia, having returned that part of Polish territory which it had conquered, was obliged to return to the new Grand Duchy of Warsaw not only the current local and regional archives relating to the restored territory but also the relevant State documents ("Berlin Archives").[242] In the same way, by the Treaty of Riga of 18 March 1921 (art. 11), Poland recovered the central archives of the former Polish Republic, transferred to Russia at the end of the eighteenth century, as well as those of the former autonomous Kingdom of Poland for the period 1815-1863 and the following period up to 1876. It also obtained the documents of the Office of the Secretary of State for the Kingdom of Poland (which acted as the central Russian administration at St. Petersburg from 1815 to 1863), those of the Tsar's Chancellery for Polish Affairs, and lastly, the archival collection of the Office of the Russian Ministry of the Interior responsible for agrarian reform in Poland.[243] Reference can also be made to the case of the Schleswig archives. Under the Treaty of Vienna of 30 October 1864, Denmark had to cede the three duchies of Schleswig, Holstein and Lauenberg. Article XX of the said Treaty provided as follows:

> The deeds of property, documents of the administration and civil justice, concerning the ceded territory which are in the archives of the Kingdom of Denmark shall be dispatched to the Commissioners of the new Government of the Duchies as soon as possible.[244]

For a more detailed examination of this practice of States (although, in general, it would be wrong to attach too much importance to peace treaties, where solutions are based on a given "power relationship"), a distinction can be made between two cases, namely that of archives removed or taken from the territory in question and that of archives constituted outside that territory but relating directly to it.

(9) Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State. There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article III of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows:

> . . . Should any of the documents [archives, documents and registers] be found missing, they shall be restored by the French Government on the demand of the German Government.[245]

This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles of 28 June 1919, the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.[246] Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the Treaty of Rapallo (12 November 1920) and the Treaty of Rome (27 January 1924), which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like relating to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.[247] The agreement between Italy and Yugoslavia signed at Rome on 23 December 1950 is even more specific: article 1 provides for the delivery to Yugoslavia of all archives "which are in the possession, or which will come into the possession of the Italian State, of local authorities, of public institutions and publicly owned companies and associations", and adds that "should the material referred to not be in Italy, the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government".[248] However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains . . . archives relating to the ceded territory which are preserved in a repository situated outside that territory".[249] Fauchille did not go so far as to sup-

[239] See Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, p. 27.

[240] League of Nations, *Treaty Series*, vol. III, p. 72.

[241] See Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, pp. 19-20. See also *Yearbook . . . 1979*, vol. II (Part One), p. 76, document A/CN.4/322 and Add.1 and 2, paras. 27-29.

[242] Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, p. 20.

[243] *Ibid.*, pp. 35-36; English trans. of the Treaty in League of Nations, *Treaty Series*, vol. VI, p. 123; art. 11, pp. 139 *et seq.*

[244] Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, p. 26; English trans. in Oakes and Mowat, *op. cit.*, p. 199.

[245] See footnote 219 above.

[246] See footnote 218 above.

[247] Art. 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 134). For the Rapallo Treaty, see League of Nations, *Treaty Series*, vol. XVIII, p. 387; for the Rome Treaty, *ibid.*, vol. XXIV, p. 31.

[248] United Nations, *Treaty Series*, vol. 171, p. 293.

[249] F. Despagnet, *Cours de droit international public*, 4th ed. (Paris, Recueil Sirey, 1910), p. 128, para. 99.

port this contrary rule, but implied that distinction could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchillle put it:

> Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?[250]

The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that:

> the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, was in no way divested of that right by the change of nationality imposed on a part of its territory".[251]

It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives relating to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.[252] Hence the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

(10) This isolated school of thought is being mentioned because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If credence is to be given to at least one interpretation of the texts, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new Government of Lombardy.[253] If there is justification for interpreting in a very strict and narrow way the expressions used—which apparently refer only to items relating to current administration—it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.[254] Article 2 of the Treaty of the same date between France and Sardinia[255] refers to the aforementioned provisions of the Treaty of Zurich, while article XV of the Treaty of Peace concluded between Austria, France and Sardinia, also on the same date, reproduces them word for word.[256] Similarly, a Convention between France and Sardinia signed on 23 August 1860, pursuant to the Treaty of Turin of 24 March 1860 confirming the cession of Savoy and the district of Nice to France by Sardinia, includes an article X which is cast in the same mould as the articles cited above when it states:

> Archives containing titles to property and administrative, religious and judicial [*"de justice civile"*] documents relating to Savoy and to the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.[257]

(11) It is only with some hesitation that it may be concluded that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property . . . administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership were claimed by the successor. If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementos, and so forth, are excluded from the

[250] P. Fauchille, *Traité de droit international public*, 8th ed. of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1922), vol. I, part I, p. 360, para. 219.

[251] Judgement of the Court of Nancy of 16 May 1896, *Dufresne* v. *the State* (Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, 1896* (Paris, Bureau de la jurisprudence générale, 1896), part 2, p. 412).

[252] The decision concerned sixteen cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.

[253] Art. XV of the Franco-Austrian Peace Treaty signed at Zurich on 10 November 1859 (G. F. de Martens, ed., *Nouveau Recueil général des traités* (Gottingen, Dieterich, 1860), vol. XVI, part II, p. 522).

[254] For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870-1871", *Revue générale de droit international public* (Paris), vol. XVIII (1911), p. 35; and *idem*, *Le Traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, footnote 2.

[255] Art. 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (de Martens, ed., *Nouveau Recueil général de traités*, vol. XVI *(op. cit.)*, part II, p. 256).

[256] Art. XV of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (*ibid.*, p. 537).

[257] *Ibid.*, vol. XVII (*op. cit.*, 1869), part. II, p. 25.

transfer.[258] What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some ninety years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government:

> all archives, historical and administrative, prior to 1860, which concern the territory ceded to France under the Treaty of 24 March 1860, and the Convention of 23 August 1860.[259]

Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating exclusively or principally to the territory to which the succession of States relates, even if those archives have been removed or are situated outside that territory.

(12) There are also examples of the treatment of items and documents that relate to the territory involved in the succession of States but that have been established and have always been kept outside this territory. Many treaties include this category among the archives that must pass to the successor State. As mentioned above (para. (11)), under the 1947 Treaty of Peace with Italy, France was able to obtain archives relating to Savoy and Nice established by the city of Turin. Under the 1947 Treaty of Peace with Hungary, Yugoslavia obtained all eighteenth-century archives concerning Illyria that had been kept by Hungary.[260] Under the Craiova agreement of 7 September 1940 between Bulgaria and Romania concerning the cession by Romania to Bulgaria of the Southern Dobruja, Bulgaria obtained, in addition to the archives in the ceded territory, certified copies of the documents being kept in Bucharest and relating to the region newly acquired by Bulgaria.

(13) What happens if the archives relating to the territory affected by the change in sovereignty are situated neither within the frontiers of this territory nor in the predecessor State? Article 1 of the agreement between Italy and Yugoslavia signed at Rome on 23 December 1950 provides that:

> Should the material referred to not be in Italy, the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government.[261]

In other words, to use terms dear to French civil law experts, what is involved here is not so much an "obligation of result" as an "obligation of means".[262]

(14) The rule concerning the transfer to the successor State of archives relating to a part of another State's territory is taken to be so obvious that there is no risk of its being jeopardized by the lack of references to it in agreements. This is the view of one writer, who states:

> Since the delivery of public archives relating to the ceded territories is a necessary consequence of annexation, it is hardly surprising that in any treaties of annexation there is no clause concerning this obligation. It is implied, for it follows from the renunciation by the ceding State of all its rights and titles in the ceded territory.[263]

The terminology used has aged, and annexation itself is obsolete. However, the idea on which the rule is based is still valid, the object being, according to the same author, to "provide [the successor State] with whatever is necessary or useful for the administration of the territory".[264]

The "archives-territory" link

(15) As has been mentioned above, State practice shows that the link between archives and the territory to which the succession of States relates is taken very broadly into account. But the nature of this link should be made quite clear. Expert archivists generally uphold two principles, that of "territorial origin" and that of "territorial or functional connection", each of which is subject to various and even different interpretations, leaving room for uncertainties. What seems to be obvious is that the successor State cannot claim just any archives; it can claim only those that relate exclusively or principally to the territory. In order to determine which those archives are it should be taken into account that there are archives which were acquired before the succession of States, either by or on behalf of the territory, against payment or free of cost, and with funds

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[258] Art. X of the Convention of 23 August 1860 between France and Sardinia (see footnote 257 above) provided that France was to *return* to the Sardinian Government "titles and documents relating to the royal family" (which implied that France had already taken possession of them together with the other historical archives). This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, art. 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills or other papers".

[259] United Nations, *Treaty Series*, vol. 49, p. 132.

[260] See art. 11, para. 3, of the Treaty of Peace with Hungary of 10 February 1947 (*ibid.*, vol. 41, p. 178).

[261] *Ibid.*, vol. 171, p. 292.

[262] There are other cases in history of the transfer to the successor State of archives constituted outside the territory involved in the sucession of States. These examples do not fall into any of the categories provided for in the system used here for the succession of States, since they concern changes in colonial overlords. These outdated examples are mentioned here solely for information purposes. (In old works, they were regarded as transfers of part of a territory from one State to another or from one colonial empire to another.)

The Protocol concerning the return by Sweden to France of the Island of St. Bartholomew in the West Indies states that:

> ". . . the papers and documents of all kinds concerning the acts [of the Swedish Crown] that may be in the hands of the Swedish administration . . . will be delivered to the French Government" (art. III, para. 2, of the Protocol of Paris of 31 October 1877 to the Treaty between France and Sweden signed at Paris on 10 August 1877 (*British and Foreign State Papers, 1876-1877* (London, Ridgway, 1884), vol. LXVIII, p. 625)).

In section VIII of the Treaty of Versailles concerning Shantung, art. 158 obliges Germany to return to Japan the archives and documents relating to the Kiaochow territory, "wherever they might be" (see footnote 218 above).

Art. 1 of the convention between the United States of America and Denmark of 4 August 1916 concerning the cession of the Danish West Indies awards to the United States any archives in Denmark concerning these islands (see footnote 221 above), just as art. VIII of the Peace Treaty between Spain and the United States of America of 10 December 1898 had already given the United States the same right with regard to archives in the Iberian peninsula relating to Cuba, Puerto Rico, the Philippines and the island of Guam (see footnote 222 above).

[263] Jacob, *op. cit.*, p. 17.

[264] *Ibid.*

of the territory or otherwise.[265] From this standpoint, such archives must follow the destiny of the territory on the succession of States. Furthermore, the organic link between the territory and the archives relating to it must be taken into account.[266] However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as a whole, and . . . only incidentally to the ceded territory", they "remain the property of the predecessor State, [but] it is generally agreed that copies of them must be furnished to the annexing State at its request".[267] The "archives-territory" link was specifically taken into account in the aforementioned Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.[268]

(16) Attention is drawn at this point to the decision of the Franco-Italian Conciliation Commission, in which the Commission held that archives and historical documents, even if they belong to a municipality whose territory is divided by the new frontier drawn in the 1947 Treaty of Peace with Italy, must be assigned in their entirety to France, the successor State, whenever they related to the ceded territory.[269] As was mentioned in an earlier context (para. (9) above), after the Franco-German war of 1870 the archives of Alsace-Lorraine were handed over to the German successor State. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".[270]

Special obligations of the successor State

(17) The practice of States shows that many treaties impose upon the successor State an essential obligation which constitutes the normal counterpart of the predecessor State's duty to transfer archives to the successor State. Territorial changes are often accompanied by population movements (new frontier lines which divide the inhabitants on the basis of a right of option, for instance). Obviously, this population cannot be governed without at least administrative archives. Consequently, in cases where archives pass to the successor State by agreement, it cannot refuse to deliver to the predecessor State, upon the latter's request, any copies it may need. Any expense involved must, of course, be defrayed by the requesting State. It is understood that the handing over of these papers must not jeopardize the security or sovereignty of the successor State. For example, if the predecessor State claims the purely technical file of a military base it has constructed in the territory or the judicial record of one of its nationals who has left the ceded territory, the successor State can refuse to hand over copies of either. Such cases involve elements of discretion and expediency of which the successor State, like any other State, may not be deprived. The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future. The aforementioned Convention of 4 August 1916 between the United States and Denmark providing for the cession of the Danish West Indies stipulates, in the third paragraph of article 1, that:

> archives and records shall be carefully preserved and authenticated copies thereof, as may be required, shall be at all times given to the . . . Danish Government, . . . or to such properly authorized persons as may apply for them.[271]

Time-limits for handing over the archives

(18) These time-limits vary from one agreement to another. The finest example of the speed with which the operation can be carried out is undoubtedly to be found in the Treaty of 26 June 1816 between Prussia and the Netherlands, article XLI of which provides that:

> Archives, maps and other documents . . . shall be handed over to the new authorities at the same time as the territories themselves.[272]

State libraries

(19) In earlier discussion on this topic, it was explained how difficult it has been to find information about the transfer of libraries.[273] Three peace treaties signed after the First World War nevertheless expressly mentioned that libraries must be restored at the same time as archives. The instruments in question are the Treaty of Moscow between Russia and Latvia of 11 Au-

[265] Art. 11 of the Treaty of Peace with Hungary of 10 February 1947 (see footnote 260 above) rightly states, in para. 2, that the successor States, Czechoslovakia and Yugoslavia, shall have no right to archives or objects "acquired by purchase, gift or legacy" or to "original works of Hungarians".

[266] By the Treaty of Peace of 10 February 1947 (art. 11, para. 1) Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage [and] which originated in those territories . . .".

[267] C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 384. See also D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *International Relations*, pp. 232-233.

[268] Art. 6 of the Agreement (see footnote 248 above) provides that archives which are indivisible or of common interest to both parties:

> "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, according to the extent of the territory or the number of persons, institutions or companies to which these documents relate. In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original".

[269] Decision No. 163, rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 503). This decision contains the following passage:

> "Communal property which shall be apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include 'all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian municipality. What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory." (*Ibid.*, pp. 516-517.)

[270] Convention of 26 April 1972, signed at Strasbourg (de Martens, *Nouveau Recueil général des traités* (Gottingen, Dieterich, 1874), vol. XX, p. 875).

[271] See footnote 221 above.

[272] *British and Foreign State Papers, 1815-1816* (London, Ridgway, 1838), vol. III, p. 733.

[273] See *Yearbook . . . 1970*, vol. II, p. 161, document A/CN.4/226, paras. (47) *et seq.* of the commentary to art. 7.

gust 1920, article 11, para. 1;[274] the Treaty of Moscow between Russia and Lithuania of 12 July 1920, article 9, para. 1;[275] and the Treaty of Riga between Poland, Russia and the Ukraine of 18 March 1921, article 11, para. 1.[276] The formulation in the two Treaties of Moscow and rephrased in the Treaty of Riga is as follows:

> The Russian Government shall at its own expense restore to . . . and return to the . . . Government all libraries, records, museums, works of art, educational material, documents and other property of educational and scientific establishments, Government, religious and communal property and property of incorporated institutions, in so far as such objects were removed from . . . territory during the world war of 1914-1917, and in so far as they are or may be actually in the possession of the Governmental or Public administrative bodies of Russia.

(20) The conclusions and solutions to which a review of State practice gives rise would not appear to provide very promising material on which to base a proposal for an acceptable draft article on the problem of succession to State archives in the event of the transfer of part of a State's territory to another State. There are many reasons why the solutions adopted in treaties cannot be taken as an absolute and literal model for dealing with this problem in a draft article:

(*a*) First, it is clear that peace treaties are almost inevitably an occasion for the victor to impose on the vanquished solutions which are most advantageous for the former. Germany, the victor in the Franco-German war of 1870, dictated its own law as regards the transfer of archives relating to Alsace-Lorraine right until 1919 when France, in turn, was able to dictate its own law for the return of those same archives, as well as others, relating to the same territory. History records a great many instances of such reversals, involving first the break-up and later the reconstitution of archives, or, at best, global and massive transfers one day in one direction and the next day in the other.

(*b*) The solutions offered by practice are not very subtle nor always equitable. In practice, decisions concerning the transfer to the successor State of archives of every kind—whether as documentary evidence, instruments of administration, historical material or cultural heritage—are made without sufficient allowance for certain pertinent factors. It is true that in many cases of the transfer of archives, including central archives and archives of an historical character relating to the ceded territory, the predecessor State was given an opportunity to take copies of these archives.

(*c*) As regards this type of succession, the general provisions of the article already adopted should be borne in mind, lest the solutions chosen conflict, without good reason, with those general provisions.

(21) In this connection, reference is made to the corresponding provision in Part II on State property (art. 13, paragraph 1) of which places the emphasis on the agreement between the predecessor State and the successor State, and subparagraph (*b*) of which states that, in the absence of such an agreement, movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

(22) It should not be forgotten that, in the view of the Commission, the type of succession referred to here concerns the transfer of a small portion of territory. The problem of State archives where part of a territory is transferred may be stated in the following terms: State archives of every kind which have a direct and necessary link with the management and administration of the part of the territory transferred must unquestionably pass to the successor State. The basic principle is that the part of territory concerned must be transferred so as to leave to the successor State as viable a territory as possible in order to avoid any disruption of management and facilitate proper administration. In this connection, it may happen that in consequence of the transfer of a part of one State's territory to another State some—or many—of the inhabitants, preferring to retain their nationality, leave that territory and settle in the other part of the territory which remains under the sovereignty of the predecessor State. Parts of the State archives that pass, such as taxation records or records of births, marriages and deaths, concern these transplanted inhabitants. It will then be for the predecessor State to ask the successor State for all facilities, such as microfilming, in order to obtain the archives necessary for administrative operations relating to its evacuated nationals. But in no case, inasmuch as it is a minority of the inhabitants which emigrates, may the successor State be deprived of the archives necessary for administrative operations relating to the majority of the population which stays in the transferred territory. The foregoing remarks concern the case of State archives which, whether or not situated in the part of territory transferred, have a direct and necessary link with its administration. This means, by and large, State archives of an administrative character. There remains the case of State archives of an historical or cultural character. If these historical archives relate exclusively or principally to the part of territory transferred, there is a strong presumption that they are distinctive and individualized and constitute a homogeneous and autonomous collection of archives directly connected with and forming an integral part of the historic and cultural heritage of the part of territory transferred. In logic and equity this property should pass to the successor State.

It follows from the preceding comments that where the archives are not State archives at all, but are local administrative, historical or cultural archives, owned in its own right by the part of territory transferred, they are not affected by these draft articles, for these articles are concerned with State archives. Local archives which are proper to the territory transferred remain the property of that territory, and the predecessor State has no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State.

(23) These various points may be summed up as follows:

Where a part of a State's territory is transferred by that State to another State:

[274] League of Nations, *Treaty Series*, vol. II, p. 221.
[275] *Ibid.*, vol. III, p. 129.
[276] *Ibid.*, vol. VI, p. 139.

(*a*) State archives of every kind having a direct and necessary link with the administration of the transferred territory pass to the successor State.

(*b*) State archives which relate exclusively or principally to the part of territory transferred pass to the successor State.

(*c*) Whatever their nature or contents, local archives proper to the part of territory transferred are not affected by the succession of States.

(*d*) Because of the administrative needs of the successor State, which is responsible for administering the part of territory transferred, and of the predecessor State, which has a duty to protect its interests as well as those of its nationals who have left the part of territory transferred, and secondly, because of the problems of the indivisibility of certain archives that constitute an administrative, historical or cultural heritage, the only desirable solution that can be visualized is that the parties should settle an intricate and complex issue by agreement. Accordingly, in the settlement of these problems, priority should be given, over all the solutions put forward, to agreement between the predecessor State and the successor State. This agreement should be based on principles of equity and take account of all the special circumstances, particularly of the fact that the part of territory transferred has contributed, financially or otherwise, to the formation and preservation of archive collections. The principles of equity relied upon should make it possible to take account of various factors, including the requirements of viability of the transferred territory and apportionment according to the shares contributed by the predecessor State and by the territory separated from that State.

(24) The Commission, in the light of the foregoing considerations, prepared the present text for article 25, which concerns the case of succession of States corresponding to that covered by article 13, namely, transfer of part of the territory of a State. The cases of transfer of territory envisaged have been explained in the commentary to article 13 (para. 6). *Paragraph 1* of article 25 repeats, for the case of State archives, the rule contained in paragraph 1 of article 13, which establishes the primacy of agreement.

(25) In the absence of an agreement between the predecessor and successor States, the provisions of *paragraph 2* of article 25 apply. *Subparagraph* (a) of paragraph 2 deals with what is sometimes called "administrative" archives, providing that they shall pass to the successor State. To avoid using such an expression, which is not legally precise, the Commission referred to that category of archives as "the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred", terminology which is largely followed in the corresponding provision of article 26 (subpara. 1(*b*)). The Commission preferred to use the phrase "should be at the disposal of the State to which the territory in question is transferred" instead of that found in subparagraph 1(*b*) of article 26, "should be in that territory", as being more appropriate to take account of the specific characteristics of the case of succession of States covered by article 25.

Subparagraph (b) of paragraph 2 embodies the rule according to which the part of the State archives of the predecessor State other than the part referred to in subparagraph (*a*) shall pass to the successor State if it relates exclusively or principally to the territory to which the succession of States relates. The words "exclusively or principally" were likewise regarded as being the most appropriate to delimit the rule, bearing in mind the basic characteristic of the case of succession of States dealt with in the article, namely, the transfer of small areas of territory.

(26) *Paragraph 3* provides, for the case of a succession of States arising from the transfer of part of the territory of a State, the rule embodied in paragraph 3 of article 26. The relevant paragraphs of the commentary to that provision (paras. (20) to (24)) are also applicable to paragraph 3 of the present article.

(27) *Paragraphs 4 and 5* establish the duty for the State to which State archives pass or with which they remain, to make available to the other State, at the request and at the expense of that other State, appropriate reproductions of its State archives. *Paragraph 4* deals with the situation where the requesting State is the successor State, in which case the documents of State archives to be reproduced are those connected with the interests of the transferred territory, a qualification which is also made in paragraph 2 of article 26. *Paragraph 5* covers the situation where the requesting State is the predecessor State; in such a case, the documents of State archives to be reproduced are those which have passed to the successor State in accordance with the provisions of paragraph 1 or 2 of article 25.

Article 26. Newly independent State

1. When the successor State is a newly independent State:

(*a*) archives having belonged to the territory to which the succession of States relates and having become State archives of the predecessor State during the period of dependence shall pass to the newly independent State;

(*b*) the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be in that territory shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those mentioned in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives which,

having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

Commentary

(1) The present article principally envisages, like articles 14 and 36, the case where a newly independent State appears on the international scene as a result of decolonization. In such a case, the problem of succession in respect of archives is particularly acute.

(2) The Commission has clarified the notion of a "newly independent State" several times within the framework of the categorization used in the present draft. Reference should be made in particular to the definition in article 2, subparagraph 1(*e*) and the commentary (para. (*b*)) to that subparagraph, as well as to articles 14 and 36.[277]

(3) The present article is closely modelled on article 14, though certain new elements have been added in view of the uniqueness of State archives as a category of matters which pass at a succession of States.

(4) *Subparagraph 1*(a) deals with "archives"—not necessarily "State archives"—which had belonged to the territory to which the succession of States relates before it became dependent and which became State archives of the predecessor State during its dependency. Since no reason can be found for deviating from the rule enunciated in article 14, subparagraph 1(*e*), concerning movable property satisfying the same conditions, subparagraph 1(*a*) of the present article uses the same wording, except the word "archives", as that adopted for the former provision.

(5) By the use of the word "archives" rather than "State archives" at the beginning of *subparagraph 1*(a), it is intended to cover archives which belonged to the territory in question, whatever the political status it had enjoyed or under whatever ownership the archives had been kept in the pre-colonial period —whether by the central Government, local governments or tribes, religious missions, private enterprises or individuals.

(6) Such historical archives of the pre-colonial period are not the archives of the predecessor State, but the archives of the territory itself, which has constituted them in the course of its history or has acquired them with its own funds or in some other manner. They must consequently revert to the newly independent State, quite apart from any question of succession of States, if they are still within its territory at the time of its accession to independence or can be claimed by it if they have been removed from the territory by the colonial Power.

(7) Examples of the passing of historical archives may be found in some treaties. Italy was obliged to return the archives it had removed from Ethiopia during its annexation when, after the Second World War, its colonization was terminated. Article 37 of the Treaty of Peace with Italy of 10 February 1947 provides that:

> . . . Italy shall restore all . . . archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.[278]

In the case of Viet Nam, a Franco-Vietnamese agreement in the matter of archives, signed on 15 June 1950, provided in its article 7 that the archives constituted by the Imperial Government and its Kinh Luoc[279] and preserved at the Central Archives before the French occupation were to revert to the Government of Viet Nam.

(8) In the case of Algeria, the archives relating to its pre-colonial history had been carefully catalogued, added to and preserved in Algiers by the French administering authority until immediately before independence, when they were taken to France (to Nantes, Paris and, more particularly, a special archives depot at Aix-en-Provence). These archives consisted of what is commonly known as the "Arabic collection", the "Turkish collection" and the "Spanish collection". As a result of negotiations between the two Governments, some registers of the pay of Janissaries, forming part of the documents in the "Turkish collection", and microfilms of part of the "Spanish collection" were returned in 1966. By a Franco-Algerian exchange of letters of 23 December 1966, the Algerian Government obtained the restitution of "450 original registers in the Turkish and Arabic languages relating to the administration of Algeria before 1830", i.e. before the French colonial occupation. Under the terms of this exchange of letters, the National Library of Algiers was to receive before July 1967, free of charge, microfilms of documents in Spanish, which had been moved from Algeria to Aix-en-Provence immediately before independence and which constituted the "Spanish collection" of Algeria relating to the Spanish occupation of Algerian coastal regions. The same exchange of letters provided that questions concerning archives not settled by that instrument would form the subject of subsequent consultations. Thus Algeria raised the problem of its historical archives again in 1974. In april 1975, on the occasion of the visit to Algeria of the President of the French

[277] See above, paras. (1)-(3) of the commentary to art. 14, and below, paras. (1)-(2) of the commentary to art. 36.

[278] United Nations, *Treaty Series*, vol. 49, p. 142. On the basis of that article (and art. 75) of the Treaty of Peace, Ethiopia and Italy concluded an Agreement concerning the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration, signed at Addis Ababa on 5 March 1956, which had three annexes, A, B and C, listing the archives and objects of historical value that had been or were to be returned to Ethiopia by Italy (*ibid.*, vol. 267, pp. 204-216).

[279] The "Kinh Luoc" were governors or prefects of the Emperor of Indo-China before the French occupation of the Indo-Chinese peninsula.

Republic, 153 boxes of Algerian historical archives forming part of the "Arabic collection" were returned by the French Government.[280]

(9) The historical documents of the Netherlands relating to Indonesia were the subject of negotiations between the former administering Power and the newly independent State within the framework of cooperation in the field of cultural and historical property. The relevant agreement concluded between the two countries in 1976 provides, *inter alia*:

> That it is desirable to make cultural objects such as ethnographical and archival material available for exhibitions and study in the other country in order to fill the gaps in the already existing collections of cultural objects in both countries, with a view to promoting mutual understanding and appreciation of each other's cultural heritage and history;
>
> That in general principle, archives ought to be kept by the administration that originated them.[281]

(10) The rule enunciated in *subparagraph 1*(a) was stressed in the proceedings of an international round table conference on archives, which state that:

> It appears undeniable that the metropolitan country should return to States that achieve independence, in the first place, the archives which antedate the colonial regime, which are without question the property of the territory . . . It is regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered indispensable.[282]

(11) *Subparagraph 1*(b) deals with what is sometimes called "administrative" archives and provides that they shall also pass to the newly independent State. The Commission, avoiding the use of that expression, which is not sufficiently precise to be used as a legal term, decided to refer to such category of archives as "the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory".

(12) In the case of the decolonization of Libya, General Assembly resolution 388 A (V) of 15 December 1950, entitled "Economic and financial provisions relating to Libya", expressed the wish of the United Nations that the newly independent State should possess at least the administrative archives most indispensable to current administration. Accordingly, article I, paragraph 2 (*a*), of the resolution provided for the immediate transfer to Libya of "the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution".[283]

(13) The international conference of archivists mentioned above (para. (10)) stated in this connection:

> It seems undeniable that [the former administering Powers] have . . . the duty to hand over all documents which facilitate the continuity of the administrative work and the preservation of the interests of the local population . . . Consequently, titles of ownership of the State and of semi-public institutions, documents concerning public buildings, railways, roads and bridges, etc., land survey documents, census records, records of births, marriages and deaths, etc., will normally be handed over with the territory itself. This assumes the regular transfer of local administrative archives to the new authorities. It is sometimes regrettable that the conditions under which the transfer of powers from one authority to the other occurred have not always been such as to ensure the regularity of this transfer of archives, which may be regarded as indispensable.[284]

(14) *Paragraph 2* of article 26 concerns those parts of State archives which, though not falling under paragraph 1, are "of interest" to the territory to which the succession of States relates. The paragraph provides that the passing of such archives, or their appropriate reproduction, shall be determined by agreement between the predecessor State and the newly independent State. Such agreement, however, is subject to the condition that each of the parties must "benefit as widely and equitably as possible" from the archives in question.

(15) One of the categories of State archives covered by *paragraph 2* are those accumulated by the administrating Power during the colonial period, relating to the *imperium* or *dominium* of that Power and to its colonial policy generally in the territory concerned. The former metropolitan country is usually careful to remove all such archives before the independence of the territory, and many considerations of policy and expediency prevent it from transferring them to the newly independent State.

(16) The same international conference of archivists stated:

> There are apparently legal grounds for distinguishing in the matter of archives between sovereignty collections and administrative collections: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country, whose history they directly concern.[285]

An author expresses the same opinion:

> Emancipation raises a new problem. The right of new States to possess the archives essential to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the populations, remains unquestionable. But there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.[286]

(17) Nevertheless, it is undeniable that some of the archives connected with the *imperium* or *dominium* of the former administering Power are "of interest" also

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[280] See *Yearbook . . . 1979*, vol. II (Part One), pp. 113-114, document A/CN.4/322 and Add.1 and 2, paras. 168, 169 and 171.

[281] Report of the Secretary-General on restitution of works of art to countries victims of expropriation (A/32/203), p. 7.

[282] Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, pp. 43-44.

[283] In the case of Eritrea, however, the General Assembly adopted certain provisions of which some are not wholly in accord with those that it had one year earlier adopted with regard to Libya. Article II, para. 2, of resolution 530 (VI) of 29 January 1952, entitled "Economic and financial provisions relating to Eritrea", permitted Italy to hand over at its convenience to the provisional administering Power either the originals or copies of documents and archives.

[284] Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, pp. 43-44.

[285] *Ibid.*, p. 44.

[286] C. Laroche, "Les archives françaises d'outre-mer", *Comptes rendus mensuels des séances de l'Académie des sciences d'outre-mer, Séances des 4 et 18 mars 1966* (Paris), t. XXVI, vol. III (March 1966), p. 130.

(and sometimes even primarily) to the newly independent State. They are, for instance, the archives relating to the conclusion of treaties applicable to the territory concerned, or to the diplomatic relations between the administering Power and third States with respect to the territory concerned. While it would be unrealistic for the newly independent State to expect the immediate and complete transfer of archives connected with the *imperium* or *dominium* of the predecessor State, it would be quite inequitable for the former State to be deprived of access to at least those of such archives in which it shares interest.

(18) No simple rule of passing or non-passing, therefore, would be satisfactory in the case of such State archives. The Commission considers that the best solution would be for the States concerned to settle the matter by an agreement based on the principle of mutual benefit and equity. In negotiating such an agreement, due account should be taken of the need to preserve the unity of archives and of the modern technology which has made rapid reproduction of documents possible through microfilming or photocopying. It should also be borne in mind that almost all countries have laws under which all public political documents, including the most secret ones, become accessible to the public after a certain time. If any person is legally entitled to consult documents relating to sovereign activities after the lapse of a period of 15, 20 or 30 years, there cannot be any reason why the newly independent State directly interested in documents relating to its territory should not be given the right to obtain them in microfilm or photocopies, if need be at its own expense.

(19) It was in conformity with such a rule that the French-Algerian negotiations on the questions of political as well as historical archives were conducted in 1974-1975. The two States exchanged diplomatic correspondence on 22 April and 20 May 1975, which shows that the French Government regarded it as "entirely in conformity with current practice of co-operation among historians to envisage the microfilming" of France's archives of sovereignty concerning the colonization of Algeria.[287]

(20) *Paragraph 3* stipulates that the predecessor State shall provide the newly independent State with the "best available evidence" from its State archives, including both that "which bears upon title to the territory of the newly independent State or its boundaries" and that "which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article".

(21) The "best available evidence" means either the originals or reproductions of them. Which of the two is the "best evidence" depends upon circumstances.[288]

(22) The first type of evidence covered by paragraph 3 is often intermingled with others relating to the *imperium* or *dominium* of the administering Power over the territory concerned. The evidence from the archives which bears upon title to such territory or its boundaries is, however, of vital importance to the very identity of the newly independent State. The need for such evidence is especially crucial when the latter State is in dispute or litigation with a third State concerning the title to part of its territory or its boundaries. The Commission considers, therefore, that the predecessor State has a duty to transmit to the newly independent State the "best evidence" available to it.[289]

(23) As to the second type of evidence, the words "documents . . . which pass . . . pursuant to other provisions of the present article" are intended to cover all types of document which pass to the successor State by the direct application of paragraphs 1 and 2 and the first part of paragraph 3, as well as indirectly by the application of paragraphs 5 and 6.

(24) One example of this type of document may be found in documents relating to the interpretation of treaties applicable to the territory concerned concluded by the administering Power. It should be noted that the hesitation of new independent States in notifying their succession to certain treaties is sometimes due to their uncertainty about the application of those treaties to their territory—or even about their contents.

(25) *Paragraph 4* establishes a duty of co-operation between the predecessor State and the newly independent successor State for the purpose of recovering those archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence, a common occurrence. This paragraph is a corollary and should be read in the light of paragraph 1(*a*) of this article.

(26) *Paragraphs 5 and 6* reflect the decision which the Commission adopted in regard to article 14, to assimilate to the case of a newly independent State falling under paragraphs 1 to 3 of article 26 situations in which a newly independent State is formed from two or more dependent territories, or a dependent territory becomes part of the territory of an already independent State other than the State which was responsible for its international relations.

(27) *Paragraph 7* refers to certain inalienable rights of the peoples of the predecessor State and the newly independent State, providing that agreements concluded between those States in regard to State archives of the former State "shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage". The paragraph is thus intended to lay down three major rights which must be respected by such States when they negotiate the settlement of any question regarding State archives of the predecessor State.

[287] Letter dated 20 May 1975 addressed by Mr. Sauvagrargues, French Minister of Foreign Affairs, to Mr. Bedjaoui, Ambassador of Algeria to France, in reply to his letter of 22 April 1975. (See *Yearbook . . . 1979*, vol. II (Part One), p. 111, document A/CN.4/322 and Add.1 and 2, para. 156.)

[288] See J. B. Sauders, *Words and Phrases Legally Defined*, 2nd ed. (London, Butterworth, 1969), vol. 2, p. 192.

[289] It may be noted that the Cartographic Seminar of African countries and France adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the recognition of State sovereignty over all cartographic archives and proposed that such archives should be transferred to States on request and that documents relating to frontiers should be handed over simultaneously to the States concerned (Cartographic Seminar of African Countries and France, Paris, 21 May-3 June 1975, *General Report*, recommendation No. 2, "Basic Cartography").

(28) These rights have been stressed in various international forums, in particular in the recent proceedings of UNESCO.

(29) At its eighteenth session, held in Paris in October-November 1974, the General Conference of UNESCO adopted the following resolution:

The General Conference,

Bearing in mind that a great number of Member States of UNESCO have been in the past for longer or shorter duration under foreign domination, administration and occupation,

Considering that archives constituted within the territory of these States have, as a result, been removed from that territory,

Mindful of the fact that the archives in question are of great importance for the general, cultural, political and economic history of the countries which were under foreign occupation, administration and domination,

Recalling recommendation 13 of the Intergovernmental Conference on the Planning of Nations Documentation, Library and Archives Infrastructure, held in September 1974, and desirous of extending its scope,

1. *Invites* the Member States of UNESCO to give favourable consideration to the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements;

. . .[290]

(30) UNESCO's concern with problems of archives as such has been combined with an equal concern for archives considered as important parts of the cultural heritage of nations. UNESCO and its committees and groups of experts have at all times considered archives as "an essential part of the heritage of any national community"—a heritage which they are helping to reconstitute and whose restitution or returns to the country of origin they are seeking to promote. In their view, historical documents, including manuscripts, are "cultural property" forming part of the cultural heritage of peoples.[291]

(31) In 1977, pursuant to a resolution adopted by the General Conference of UNESCO at its nineteenth session,[292] the Director-General made a plea for the return of an irreplaceable cultural heritage to those who created it, as follows:

The vicissitudes of history have . . . robbed many peoples of a priceless portion of this inheritance in which their enduring identity finds its embodiment.

. . .

The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better.

. . .

These men and women who have been deprived of their cultural heritage therefore ask for the return of at least the art treasures which best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish.

This is a legitimate claim . . .

. . .

I solemnly call upon the Governments of the Organization's member States to conclude bilateral agreements for the return of cultural property to the countries from which it has been taken; to promote long-term loans, deposits, sales and donations between institutions concerned in order to encourage a fairer international exchange of cultural property. . .

. . .

I call on universities, libraries . . . that possess the most important collections, to share generously the objects in their keeping with the countries which created them and which sometimes no longer possess a single example.

I also call on institutions possessing several similar objects or records to part with at least one and return it to its country of origin, so that the young will not grow up without ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.

. . .

The return of a work of art or record to the country which created it enables a people to recover part of its memory and identity, and proves that the long dialogue between civilizations which shapes the history of the world is still continuing in an atmosphere of mutual respect between nations.[293]

(32) The protection and restoration of cultural and historical archives and works of art with a view to the preservation and future development of cultural values have received a great deal of attention in the United Nations, as evidenced in General Assembly resolutions 3206 A (XXVII) of 18 December 1972, 3148 (XXVIII) of 14 December 1973, 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975, 31/40 of 30 November 1976, 32/18 of 11 November 1977, 33/50 of 14 December 1978, 34/64 of 29 November 1979 and 35/128 of 11 December 1980. The last-mentioned resolution contains the following passages:

The General Assembly,

. . .

Aware of the importance attached by the countries of origin to the return of cultural property which is of fundamental spiritual and cultural value to them, so that they may constitute comprehensive or single collections representative of their cultural heritage,

Reaffirming that the return or restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts, documents and any other cultural or artistic treasures constitutes a step forward in the strengthening of international co-operation and the preservation and further development of cultural values,

. . .

Supporting the solemn appeal on 7 June 1978 by the Director-General of the United Nations Educational, Scientific and Cultural Organization for the return to those who created it of an irreplaceable cultural heritage,

. . .

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[290] UNESCO, *Records of the General Conference, Eighteenth Session, Resolutions* (Paris, 1974), pp. 68-69, resolution 4.212.

[291] See documents of the nineteenth session of the General Conference of UNESCO (Nairobi, October-November 1976), in particular, "Report by the Director-General on the Study on the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements" (document 19 C/94 of 6 August 1976); the report by the Director-General at the following session of the General Conference (document 20 C/102) (see footnote 209 above); the report of the Committee of Experts which met from 29 March to 2 April 1979 at Venice (document SHC-76/CONF.615/5); the report of the Committee of Experts on the setting up of an intergovernmental committee to promote the restitution or return of cultural property (Dakar, 20-23 March 1978) (document CC-78/CONF.609/3); and the Statutes of the Intergovernmental Committee for the promotion of the return of cultural property to its country of origin or its restitution in the case of illegal appropriation (UNESCO, *Records of the General Conference, Twentieth Session, Resolutions* (Paris, 1978), pp. 92-93, resolution 4/7.6/5, annex).

[292] *Ibid., Nineteenth Session, Resolutions* (Paris, 1976), p. 48, resolution 4.128.

[293] *The UNESCO Courier* (Paris), 31st year (July 1978), pp. 4-5.

2. *Requests* the United Nations Educational, Scientific and Cultural Organization to intensify its efforts to help the countries concerned to find suitable solutions to the problems relating to the return or restitution of cultural property and urges Member States to co-operate with that organization in this area;

3. *Invites* Member States to draw up, in co-operation with the United Nations Educational, Scientific and Cultural Organization, systematic inventories of cultural property existing in their territories and of cultural property abroad;

(33) The Fourth Conference of Heads of State or Government of the Non-Aligned Countries, held at Algiers from 5 to 9 September 1973, adopted a Declaration on the Preservation and Development of National Cultures which stresses:

the need to reassert indigenous cultural indentity and eliminate the harmful consequences of the colonial era and call for the preservation of their national culture and traditions.[294]

(34) At the following Conference, which took place at Colombo from 16 to 19 August 1976, two resolutions on the subject were adopted by the Heads of State or Government of the Non-Aligned Countries.[295] Resolution No. 17 ("Restitution of Art Treasures and Ancient Manuscripts to the Countries from which they have been looted") contains the following passages:

The fifth Conference . . .

. . .

2. *Reaffirms* the terms of United Nations General Assembly resolution 3187 (XXVIII) and General Assembly resolution 3391 (XXX) concerning the restitution of works of art and manuscripts to the countries from which they have been looted.

3. *Requests* urgently all States in possession of works of art and manuscripts to restore them promptly to their countries of origin.

4. *Requests* the Panel of Experts appointed by UNESCO which is entrusted with the task of restoring those works of art and manuscripts to their original owners to take the necessary measures to that effect.

(35) Lastly, the seventeenth International Round Table Conference on Archives, held in October 1977 at Cagliari, adopted a resolution reaffirming the right of peoples to their cultural heritage and to information about their history which reads, in part:

. . . The Round Table reaffirms the right of each State to recover archives which are part of its heritage of archives which are currently kept outside its territory, as well as the right of each national group to access, under specified conditions, to the sources wheresoever preserved, concerning its history, and to the copying of these sources.

Considering the large number of archival disputes and, in particular, those resulting from decolonization,

. . .

Considering that this settlement should be effected by means of bilateral or plurilateral negotiations,

The Round Table recommends that:

(*a*) The opening of negotiations should be encouraged between all parties concerned, first, regarding the problems relating to the ownership of the archives and, secondly, regarding the right of access and the right to copies,

. . .

The Round Table recognizes the legitimate right of the public authorities and of the citizens of the countries which formed part of larger political units or which were administered by foreign Powers to be informed of their own history. The legitimate right to information exists *per se*, independently of the right of ownership in the archives.

. . .[296]

Article 27. Uniting of States

1. When two or more States unite and so form a successor State, the State archives of the predecessor State shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or to its component parts shall be governed by the internal law of the successor State.

Commentary

(1) The present article deals with succession to State archives in the case of uniting of States. The agreement of the parties has a decisive place in the matter of State succession in respect of State property, archives and debts. But nowhere is it more decisive than in the case of a uniting of States. Union consists, essentially and basically, of a voluntary act. In other words, it is the agreement of the parties which settles the problems arising from the union. Even where the States did not, before uniting, reach agreement on a solution in a given field—for example, archives—such omission or silence may be interpreted without any risk of mistake as the common will to rely on the future provisions of internal law to be enacted instead by the successor State for the purpose, after the uniting of States has become a reality. Thus, if the agreement fails to determine what is to become of the predecessor State's archives, internal law prevails.

(2) It is the law in force in each component part at the time of the uniting of States that initially prevails. However, pending the uniting, such law can only give expression to the component part's sovereignty over its own archives. Consequently, in the absence of an agreed term in the agreements concerning the union, the archives of each component part do not pass automatically to the successor State, because the internal law of the component part has not been repealed. Only if the successor State adopts new legislation repealing the component parts' law in the matter of archives are those archives transferred to the successor State.

(3) The solution depends on the constitutional nature of the uniting of States. If the union results in the creation of a federation of States, it is difficult to see why the archives of each component part which survives (although with reduced international competence) should pass to the successor State. If, on the other hand, the uniting of States results in the establishment of a unitary State, the predecessor States cease to exist completely, in international law at least, and their State archives can only pass to the successor State.

[294] Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, "Economic Declaration", sect. XIV (A/9330, pp. 73-74).

[295] Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, annex IV, resolutions Nos. 17 and 24 (A/31/197, pp. 136 and 148).

[296] International Council on Archives, *Bulletin*, No. 9 (December 1977), p. 7.

(4) The solution depends also on the nature of the archives. If they are historical in character, the archives of the predecessor State are of interest to it alone and of relatively little concern to the union, unless it is decided by treaty, for reasons of prestige or other reasons, to transfer them to the seat of the union or to declare them to be its property. Any change of status or application, particularly a transfer to the benefit of the successor State of other categories of archives needed for the direction administration of each constituent State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming the union.

(5) Referring to the case of a uniting of States leading to a federation, Fauchille has said:

> The unitary State which becomes a member of a federal State or a union . . . ceasing to exist not as a State, but only as a *unitary* State, should retain its own patrimony; for the existence of this patrimony is in no way incompatible with the new regime to which it is subject. There is no reason to attribute either to the federation or the union . . . the property of the newly incorporated State, since the State, while losing its original independence, none the less retains, to some extent, . . . its legal personality.[297]

Erik Castrén shares that opinion: "Since the members of the union of States retain their statehood, their public property continues as a matter of course to belong to them".[298] Thus, both international treaty instruments and instruments of internal law, such as constitutions or basic laws, effect and define the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the devolution of State archives must be determined.

(6) Once States agree to constitute a union among themselves, it must be presumed that they intend to provide it with the means necessary for its functioning and administration. Thus State property, particularly State archives, is normally transferred to the successor State only if they are found to be necessary for the exercise of the power devolving upon that State under the constituent act of the union. The transfer of the archives of the predecessor States does not, however, seem to be necessary to the union, which will in time establish its own archives. The archives of the component parts will continue to be more useful to those parts than to the union itself, for the reasons given in paragraph (4) above.

(7) In this connection, an old but significant example may be recalled, that of the unification of Spain during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs. Consequently, there was no centralization of archives. The present organization of Spanish archives is still profoundly influenced by that system.

(8) The text of article 27 repeats that of the corresponding article in part II, namely, article 15, also entitled "Uniting of States", except for the substitution of the word "archives" for the word "property" in both paragraphs of the article. The parallel between articles 27 and 15 is obvious, and the Commission therefore refers to the commentary to the latter article as being equally applicable to the present text.

Article 28. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor otherwise agree:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

3. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproduction of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

Article 29. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) the part of the State archives of the predecessor State which should be in the territory of a successor State for normal administration of its territory shall pass to that successor State;

(*b*) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory of a successor State shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary

[297] Fauchille, *op. cit.*, p. 390, para. 233.

[298] E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours de l'Académie de droit international de La Haye, 1951-I* (Paris, Sirey, 1952), vol. 18, p. 454.

to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

Commentary to articles 28 and 29

(1) Articles 28 and 29 concern, respectively, succession to State archives in the cases of separation of part or parts of the territory of a State and of dissolution of a State. These cases are dealt with in separate draft articles, with respect both to State property and State debts, in parts II and IV of the draft, but the commentaries on each pair of articles are combined. A similar presentation is followed in the present commentary. Separation and dissolution both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. The case of separation, however, is associated with that of secession, in which the predecessor State continues to exist, whereas in the case of dissolution the predecessor State ceases to exist altogether.

(2) An important and multiple dispute concerning archives arose among Scandinavian countries, particularly at the time of the dissolution of the Union between Norway and Sweden in 1905 and of the Union between Denmark and Iceland in 1944. In the first case, it seems that both countries, Norway and Sweden, retained their respective archives which the Union had not merged, and also that it was eventually possible to apportion the central archives between the two countries, but not without great difficulty. In general, the principle of functional connection was combined with that of territorial origin in an attempt to reach a satisfactory result. The convention of 27 April 1906 concluded between Sweden and Norway one year after the dissolution of the Union settled the allocation of common archives held abroad. That convention, which settled the problem of the archives of legations that were the common property of both States, provided that:

> documents relating exclusively to Norwegian affairs, and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned.[299]

Later, pursuant to a protocol of agreement between the two countries dated 25 April 1952, Norway arranged for Sweden to transfer certain central archives which had been common archives.

(3) A general arbitration convention concluded on 15 October 1927 between Denmark and Iceland resulted in a reciprocal handing over of archives. When the Union between Denmark and Iceland was dissolved, the archives were apportioned haphazardly. There was, however, one problem which was to hold the attention of both countries, to the extent that public opinion in Iceland and Denmark was aroused, something rarely observed in disputes relating to archives. What was at stake was an important collection of parchments and manuscripts of great historical and cultural value containing, *inter alia*, old Icelandic legends and the "Flatey Book", a two-volume manuscript written in the fourteenth century by two monks of the island of Flatey, in Iceland, and tracing the history of the kingdoms of Norway. The parchments and manuscripts were not really State archives, since they had been collected in Denmark by an Icelander, Arne Magnussen, who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen.

(4) These parchments, whose value had been estimated at 600 million Swiss francs, had been duly bequeathed in perpetuity by their owner to a university foundation in Copenhagen. Of Arne Magnussen's 2,855 manuscripts and parchments, 500 had been restored to Iceland after the death of their owner and the rest were kept by the foundation which bears his name. Despite the fact that they were private property, duly bequeathed to an educational establishment, these archives were finally handed over in 1971 to the Icelandic Government, which had been claiming them since the end of the Union between Denmark and Iceland, as the local governments which preceded them had been doing since the beginning of the century. This definitive restitution occurred pursuant to Danish judicial decisions. The Arne Magnussens University Foundation of Copenhagen, to which the archives had been bequeathed by their owner, had challenged the Danish Government's decision to hand over the document to Iceland, instituting proceedings against the Danish Minister of National Education in the Court of Copenhagen. The court ruled in favour of the restitution of the archives by an order of 17 November 1966.[300] The foundation having appealed against this ruling, the Danish Supreme Court upheld the ruling by its decision of 18 March 1971.[301] Both Governments had agreed on the restitution of the originals to Iceland,[302] which was to house them in a foundation having objectives similar to those set forth in the statute of the Arne Magnussens Foundation. They also agreed on the conditions governing the loan, reproduction and consultation of these archives in the interest of scholarly research and cultural development. The agreement ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection, which

[299] E. Descamps and L. Renault, *Recueil international des traités du XX^e siècle, 1906* (Paris, Rousseau [n.d.]), pp. 1050-1051, art. 7.

[300] *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 2 (April-June 1967), pp. 401-402.

[301] See Danish text: Højesteretsdomme *(Supreme Court decision)*, 18 March 1971, Case No. 68/1970, Arne Magnussen's Bequest ("Arna Magnae" Foundation *v.* Ministry of National Education) in *Ugeskrift for Retsvaesen* (Copenhagen), No. 19 (8 May 1971), pp. 299-304, and No. 20 (15 May 1971), pp. 305-307.

[302] See also J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1974), vol. VII, p. 153, which mentions the case of the Icelandic parchments.

is of the greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the following 25 years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute.[303]

(5) In the event of dissolution of a State, each of the successor States receives the archives relating to its territory. The central archives of the dissolved State are apportioned between the successor States if they are divisible, or placed in the charge of the successor State they concern most directly if they are indivisible. Copies are generally made for any other successor State concerned.

(6) The disappearance of the Austro-Hungarian monarchy after the First World War gave rise to a very vast and complicated dispute concerning archives, which has not yet been completely settled. The territories that were detached from the Austro-Hungarian Empire to form new States, such as Czechoslovakia after the First World War, arranged for the archives concerning them to be handed over to them.[304] The treaty concluded between Czechoslovakia, Italy, Poland, Romania and the Serb-Croat-Slovene State at Sèvres on 10 August 1920, provides as follows in article 1:

> Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred or which were established as a result of the dismemberment of that monarchy, undertake to restore to each other of the following objects which may be in their respective territories:
>
> 1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories. . . .[305]

(7) The Treaty of Saint-Germain-en-Laye of 10 September 1919 between the Allied Powers and Austria contained many provisions obliging Austria to hand over archives to various new (or preconstituted) States.[306] A convention dated 6 April 1922 concluded between Austria and various States attempted to settle the difficulties which had arisen as a result of the implementation of the provisions of the Treaty of Saint-Germain-en-Laye in the matter of archives.[307] It provided, *inter alia*, for exchanges of copies of documents, for the allocation to successor States of various archives relating to industrial property, and for the establishment of a list of reciprocal claims. An agreement of 14 October 1922 concluded at Vienna between Czechoslovakia and Romania[308] provided for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy by each of the two States and concerning the other State. On 26 June 1923, the convention concluded between Austria and the Kingdom of the Serbs, Croats and Slovenes,[309] pursuant to the pertinent provisions of the Treaty of Saint-Germain-en-Laye of 1919, provided for the handing over by Austria to the Kingdom of archives concerning the Kingdom. A start was made with the implementation of this convention. On 24 November 1923 it was Romania's turn to conclude a convention with the Kingdom of the Serbs, Croats and Slovenes for the reciprocal handing over of archives, which was signed at Belgrade. Similarly, the Convention concluded between Hungary and Romania at Bucharest on 16 April 1924 with a view to the reciprocal handing over of archives[310] settled, so far as the two signatory countries were concerned, the dispute concerning archives that had resulted from the dissolution of the Austro-Hungarian monarchy. In the same year, the same two countries, Hungary and Romania, signed another convention, also in Bucharest, providing for exchanges of administrative archives.[311] A treaty of conciliation and arbitration was concluded on 23 April 1925 between Czechoslovakia and Poland[312] for a reciprocal handing over of archives inherited from the Austro-Hungarian monarchy.

(8) Yugoslavia and Czechoslovakia subsequently obtained from Hungary after the Second World War, by the Treaty of Peace of 10 February 1947, all historical archives that had been constituted by the Austro-Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.[313] Article 11, paragraph 1, of that same Treaty specifically states that the detached territories which had formed States (Czechoslovakia and Yugoslavia) were entitled to the objects "constituting [their] cultural heritage [and] which originated in those territories"; thus, the article was based on the link existing between the archives and the territory. Paragraph 2 of the same article, moreover, rightly stipulates that Czechoslovakia would not be entitled to archives or objects "acquired by purchase, gift or legacy and original works of Hungarians"; by *a contrario* reasoning, it follows, presumably, that objects acquired by the Czechoslovak territory should revert to it. In fact, these objects have been returned to Czechoslovakia.[314]

(9) The aforementioned article 11 of the Treaty of Peace with Hungary is one of the most specific with regard to time-limits for the handing over of archives; it establishes a veritable timetable within a maximum time-limit of eighteen months.

(10) This simple enumeration of only some of the many agreements reached on the subject of archives upon the dismemberment of the Austro-Hungarian

[303] A. E. Pederson, "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.

[304] Art. 93 of the Treaty of Saint-Germain-en-Laye (see footnote 218 above).

[305] *British and Foreign State Papers, 1920*, vol. CXIII *(op. cit.)*, p. 960. [*Translation by the Secretariat*]

[306] See arts. 93, 97, 192, 193, 194, 196, 249 and 250 of the Treaty of Saint-Germain-en-Laye (see footnote 218 above).

[307] See arts. 1-6 of the Convention of 6 April 1922 concluded between Austria, Czechoslovakia, Hungary, Italy, Poland, Romania and the Kingdom of the Serbs, Croats and Slovenes (Italy, Ministry of Foreign Affairs, *Trattati e convenzioni fra il Regno d'Italia e gli altri Stati*, vol. 28 (Rome, 1931), pp. 361-370).

[308] League of Nations, *Treaty Series*, vol. XXV, p. 163.

[309] See *Sluzbene Novine* [Official Journal] (Belgrade), 6th year, No. 54-VII (7 March 1924), p. 1.

[310] League of Nations, *Treaty Series*, vol. XLV, p. 331.

[311] Arts. 1 (para. 5) and 18 of the convention signed at Bucharest on 3 December 1924, for an exchange of papers relating to judicial proceedings, land, registers of births, marriages and deaths.

[312] League of Nations, *Treaty Series*, vol. XLVIII, p. 383.

[313] Art. 11 of the Treaty of Peace with Hungary (see footnote 260 above).

[314] The provisions of art. 11, para. 2, of the Treaty of Peace with Hungary apply to Yugoslavia as well.

monarchy gives some idea of the complexity of the problem to be solved in the matter of the archives of that monarchy. Certain archival disputes that arose in this connection concern the succession of States by "transfer of part of the territory of a State to another State", as has been indicated in the commentary to article 25.

(11) Other disputes, also resulting from the dissolution of the Austro-Hungarian monarchy, concerned the "separation of one or more parts of the territory of a State" to form a new State and the dissolution of a State resulting in two or more new States. The archival dispute caused by the disappearance of the Habsburg monarchy has given rise to intricate, even inextricable, situations and cross-claims in which each type of succession of States cannot always easily be separated.[315]

(12) The convention concluded at Baden on 28 May 1926 between the two States, Austria and Hungary, which had given its name to the Austro-Hungarian monarchy, had partly settled the Austro-Hungarian archival dispute. Austria handed over the "Registraturen", documents of a historical nature concerning Hungary. The archives of common interest, however, formed the subject of special provisions, pursuant to which a permanent mission of Hungarian archivists is working in Austrian State archives, has free access to the shelves and participates in the sorting of the common heritage. (The most difficult question concerning local archives related to the devolution of the archives of the two countries of Sopron (Ödenburg) and Vas (Eisenburg), which, having been transferred to Austria, formed the Burgenland, while their chief towns remained Hungarian. It was decided to leave their archives, which had remained in the chief towns, to Hungary, except for the archives of Eisenstadt and various villages, which were handed over to Austria. This solution was later supplemented by a convention permitting annual exchanges of microfilms in order not to disappoint any party.)[316]

(13) The case of the break-up of the Ottoman Empire after the First World War is similar to that of a separation of several parts of a State's territory, although the Turkish Government upheld the theory of the dissolution of a State when, during negotiation of the Treaty signed at Lausanne in 1923, it considered the new Turkish State as a successor State on the same footing as the other States which had succeeded to the Ottoman Empire. This controversy adds a justification for the joint commentaries on the cases of separation and dissolution. The following provision appears in the Treaty of Lausanne:

Article 139

Archives, registers, plans, title-deeds and other documents of every kind relating to the civil, judicial or financial administration, or the administration of Wakfs, which are at present in Turkey and are only of interest to the Government of a territory detached from the Ottoman Empire, and reciprocally those in a territory detached from the Ottoman Empire which are only of interest to the Turkish Government shall reciprocally be restored.

Archives, registers, plans, title-deeds and other documents mentioned above which are considered by the Government in whose possession they are as being also of interest to itself, may be retained by that Government, subject to its furnishing on request photographs or certified copies to the Government concerned.

Archives, registers, plans, title-deeds and other documents which have been taken away either from Turkey or from detached territories shall reciprocally be restored in original, in so far as they concern exclusively the territories from which they have been taken.

The expense entailed by these operations shall be paid by the Government applying therefor.[317]

(14) Without expressing an opinion on the exact juridical nature of the operation of the dissolution of the Third German Reich and the creation of the two German States, a brief reference will here be made to the controversies that arose concerning the Prussian Library. Difficulties having arisen with regard to the allocation of this large library, which contains 1,700,000 volumes and various Prussian archives, an Act of the Federal Republic of Germany dated 25 July 1957 placed it in the charge of a special body, the "Foundation for the Ownership of Prussian Cultural Property". This legislative decision is at present being contested by the German Democratic Republic.

(15) In adopting the present text for articles 28 and 29, the Commission has basically maintained the approach previously followed as regards the articles dealing with similar cases of succession of States—that is, separation of part or parts of the territory of a State and dissolution of a State—in the contexts of State property (arts. 16 and 17) and of State debts (arts. 38 and 39). Paragraphs 1 to 4 of article 28 and paragraphs 1 and 3 to 5 of article 29 embody the rules concerning succession to State archives that are common to both cases of succession of States. Those rules find inspiration in the text of article 26, which concerns succession to State archives in the case of newly independent States. In reflecting in articles 28 and 29, as appropriate, the applicable rules contained in article 26, the Commission has attempted to preserve as much as possible the terminological consistency while taking due account of the characteristics that distinguish the case of succession of States covered in the latter articles from those dealt with in articles 28 and 29.

(16) *Paragraph 1* of articles 28 and 29 reaffirms the primacy of the agreement between the States concerned by the succession of States, whether predecessor and successor States or successor States among

[315] See, in addition to the agreements mentioned in the preceding paragraph, the Convention of Nettuno of 20 July 1925 between Italy and the Kingdom of the Serbs, Croats and Slovenes (arts. 1 to 15); the Convention of 26 October 1927 concluded between Czechoslovakia and Poland for the handing over of archives inherited from the Austro-Hungarian monarchy and concerning each of the two contracting States; the Convention of Rome of 23 May 1931 concluded between Czechoslovakia and Italy for the apportionment and reproduction of archives of the former Austro-Hungarian army (arts. 1 to 9); the Agreement of Vienna of 26 October 1932, which enabled Poland to obtain various archives from Austria; the Convention of Belgrade signed on 30 January 1933 between Romania and Yugoslavia; etc.

[316] See the statements by Mr. Szedö at the sixth International Conference of the Archives Round Table (Direction des archives de France, *Les archives dans la vie internationale (op. cit.)*, p. 137).

[317] Treaty of Peace between the British Empire, France, Greece, Italy, Japan, Romania and the Serbo-Croat-Slovene State, of the one part, and Turkey, of the other part, signed at Lausanne on 24 July 1923 (League of Nations, *Treaty Series*, vol. XXVIII, p. 109).

themselves, in governing succession to State archives. In the absence of agreement, *subparagraph 1*(a) of those two articles embodies the rule contained in subparagraph 1(*b*) of article 26, providing for the passing to the successor State of the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in the territory of the successor State. The use of the expression "normal administration of . . . territory", also found in paragraph 2(*a*) of article 25, has been explained in paragraphs (25) and (11) of the commentaries to articles 25 and 26 respectively. In addition, under *subparagraph 1*(b) of articles 28 and 29, the part of State archives of the predecessor State, other than the part mentioned in subparagraph 1(*a*), that relates directly to the territory of the successor State or to a successor State, also passes to that successor State. A similar rule is contained in paragraph 2(*b*) of article 25, the commentary to which (para. (25)) explains the use in that article of the words "exclusively or principally", instead of the word "directly" employed in articles 28 and 29.

(17) *Paragraph 2* of article 28 and *paragraph 3* of article 29 embody the rule, also incorporated in paragraph 3 of articles 25 and 26, according to which the successor State or States shall be provided, in the case of article 28 by the predecessor State and in the case of article 29 by each successor State, with the best available evidence from State archives of the predecessor State which bears upon title to the territory of the successor State or its boundaries or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the article concerned. The Commission refers, in this connection, to the paragraphs of the commentary to article 26 relating to the foregoing provision (paras. (20)-(24)).

(18) *Paragraph 3* of article 28 and *paragraph 4* of article 29 include the safeguard clause found in paragraph 7 of article 26 regarding the rights of the peoples of the States concerned in each of the cases of succession of States envisaged in those articles to development, to information about their history and to their cultural heritage. Reference is made in this regard to the relevant paragraphs of the commentary to article 26 (paras. (27)-(35)).

(19) *Paragraph 4* of article 28 and *paragraph 5* of article 29 embody, with the adaptations required by each case of succession of States covered, the rule relating to the provision, at the request and at the expense of any of the States concerned, of appropriate reproductions of State archives connected with the interests of the territory of the requesting State.

(20) *Paragraph 5* of article 28 reproduces the provision of paragraph 2 of articles 16 and 38. Paragraph (16) of the commentary to articles 16 and 17 is also of relevance in the context of article 28.

(21) According to *paragraph 2* of article 29, the State archives of the predecessor State other than those mentioned in paragraph 1 of that article shall pass to the successor States in an equitable manner, taking into account all relevant circumstances. The wording of this provision finds inspiration in the text of the corresponding articles in parts II and IV (arts. 17 and 39, respectively) and has been adapted to suit the specific characteristics of succession to State archives in the case of the dissolution of a State.

PART IV
STATE DEBTS

SECTION 1. INTRODUCTION

Article 30. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

Commentary

As already noted,[318] the Commission, with a view to maintaining as close a parallelism as possible between the provisions concerning succession in respect of State debts in the present part and those relating to succession in respect of State property and State archives in parts II and III, decided to include at the beginning of part IV a provision on the scope of the articles contained therein. Article 30, therefore, provides that the articles in part IV apply to the effects of a succession of States in respect of State debts. It corresponds to article 7 of the draft and reproduces its wording, with the required replacement of the word "property" by the word "debts". The article is intended to make it clear that Part IV of the draft deals with only one category of public debts, namely, State debts, as defined in the following article.

Article 31.[319] *State debt*

For the purposes of the articles in the present Part, "State debt" means any financial obligation of a State towards another State, an international organization or any other subject of international law.

Commentary

(1) Article 31, which corresponds to articles 8 and 19, contains a definition of the term "State debt" for the purposes of the articles in part IV of the draft. In order to determine the precise limits of this definition, it is necessary at the outset to ascertain what a "debt" is, what legal relationships it creates, between what subjects it creates such relationships, and in what circumstances such relationships may be susceptible to novation through the intervention of another subject. Also, it is necessary to specify which "State" is meant.

The concept of debt and the relationships which it establishes

(2) The concept of "debt" is one which writers do not usually define because they consider the definition self-

[318] See above, para. 71.

[319] A subparagraph reading:

"(*b*) any other financial obligations chargeable to a State" was rejected by the Commission by a roll-call vote of 8 in favour (Messrs. Aldrich, Calle y Calle, Francis, Quentin-Baxter, Reuter, Riphagen, Šahović and Verosta) to 8 against (Messrs. Barboza, Bedjaoui, Díaz González, Njenga, Tabibi, Thiam, Ushakov and Yankov). One member (Mr. Dadzie) did not participate in the voting (see paras. (45) and (46) of the commentary to the present article).

evident. Another reason is probably that the concept of "debt" involves a two-way or two-sided problem, which can be viewed from the standpoint either of the party benefiting from the obligation (in which case there is a "debt-claim") or of the party performing the obligation (in which case there is a "debt"). This latter point suggests one element of a definition, in that a debt may be viewed as a legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance for the benefit of a certain party, called the creditor. Thus, the relationship created by such an obligation involves three elements: the party against whom the right lies (the debtor), the party to whom the right belongs (the creditor) and the subject-matter of the right (the performance to be effected).

(3) It should further be noted that the concept of debt falls within the category of personal obligations. The scope of the obligation is restricted entirely to the relationship between the debtor and the creditor. It is thus a "relative" obligation, in that the beneficiary (the creditor) cannot assert his right in the matter *erga omnes*, as it were. In private law, only the estate of the debtor as composed at the time when the creditor initiates action to obtain performance of the obligation due to him is liable for the debt.

(4) In short, the relationship between debtor and creditor is personal, at least in private law. Creditor-debtor relationships unquestionably involve personal considerations which play an essential role, both in the formation of the contractual link and in the performance of the obligation. There is a "personal equation" between the debtor and the creditor:

> Consideration of the person of the debtor, says one writer, is essential, not only in viewing the obligation as a legal bond, but also in viewing it as an asset; the debt-claim is worth what the debtor is worth.[320]

Discharge of the debt depends not only on the solvency of the debtor but also on various considerations connected with his good faith. It is therefore understandable that the creditor will be averse to any change in the person of his debtor. National laws do not normally allow the transfer of a debt without the consent of the creditor.

(5) For the purposes of the present part, the question arises whether the foregoing also applies in international law. Especially where succession of States is concerned, the main question is whether and in what circumstances a triangular relationship is created and dissolved between a third State as creditor,[321] a predecessor State as first debtor and a successor State which agrees to assume the debt.

Exclusion of debts of a State other than the predecessor State

(6) When reference is made to state debts, it is necessary to specify which State is meant. Only three States could possibly be concerned: a third State, the successor State and the predecessor State; but in fact, only the debts of one of them are legally "involved" as a result of the phenomenon of State succession: those of the predecessor State.

(7) A third State might assume financial obligations towards another third State, towards the successor State or towards the predecessor State. In the first case, the financial relationship—like any other relationship of whatever kind between two States both of which are third parties as regards the State succession—obviously cannot be affected in any way by the phenomenon of territorial change that has occurred, or by its consequences with respect to State succession. The same can be said of any financial relationship which may exist between a third State and the successor State. There is no reason why, and no way in which, debts owed by the third State to the successor State (or to a potential successor State) should come to be treated differently simply because of the succession of States. This succession does not alter the international personality of the successor State in cases where it existed as a State before the occurrence of the succession. The fact that the succession may have the effect of modifying, by enlargement, the territorial composition of the successor State does not affect, and should not in future affect, debts owed to it by a third State. If the successor State had no international personality as a State at the time the debt of the third State arose (e.g. in the case of a commercial debt between a third State and a territory having the potential to become independent or to detach itself from the territory of a State in order to form another State), it is perfectly clear that the acquisition of statehood would not cause the successor State to forfeit its rights vis-à-vis the third State.

(8) As to debts owed by a third State to the predecessor State, they are *debt-claims* of the predecessor State against the third State. Such debt-claims are State property and are considered in the context of succession of States in respect of State property. They are, therefore, not covered in the present part.

(9) The successor State might assume financial obligations to either a third State or the predecessor State. In the case of a debt to a third State, no difficulty arises. In this instance, the debt came into existence at the time when the succession of States occurred—in other words, precisely when the successor State acquired the status of successor. To speak of a debt of the successor State to a third State, that debt must have been assumed by the successor State on its own account, and in this case it is clearly unconnected with the succession of States which has occurred. The category of debt of the successor State to a third State which must be excluded from this part is precisely that kind of debt which, in the strict legal sense, is a debt of the successor State actually assumed by that State with respect to the third State and coming into existence in a context completely unconnected with the succession of States. In cases where this kind of debt was incurred after the succession of States, it is *a fortiori* excluded from the present part. On the other hand, any debt for which the successor State could be held liable vis-à-vis a third State because of the very fact of the succession of States would, strictly speaking, be not a debt assumed directly

[320] H., L. et J. Mazeaud, *Leçons de droit civil*, 4th ed. (Paris, Montchrestien, 1969), vol. II, p. 1093.

[321] Although in the following paragraphs of the commentary to the present article reference will be made, for purposes of convenience only, to "a third State" as creditor, it should be understood that the relevant considerations are applicable also to international organizations or other subjects of international law as creditors.

by the former with respect to the latter but rather a debt transmitted indirectly to the successor State as a result of the succession of States.

(10) The debt of the successor State to the predecessor State can have three possible origins. First, it may be completely unconnected with the relationship between the predecessor State and the successor State created and governed by the succession of States, in which case it should clearly remain outside the area of concern of the draft. Second, it can have its origin in the phenomenon of State succession, which may make the successor State responsible for a debt of the predecessor State. Legally speaking, however, this is not a debt of the successor State, but a debt of the predecessor State transmitted to the successor State as a result of the succession of States. This case will be discussed in connection with the debt of the predecessor State (see para. 12 below). It concerns a debt which came into existence as part of the liabilities of the predecessor State prior to the succession of States, and the subject-matter of State succession is, precisely, to determine what happens to such debt. Strictly speaking, however, this case is no longer one of a debt to the predecessor State assumed previously by the successor State.

(11) Lastly, the debt may be owed by the successor State to the predecessor State as a result of the succession of States. In other words, there may be liabilities which would have to be assumed by the successor State during, and as a result of, the process of State succession. For example, the successor State might be required to pay certain sums in compensation to the predecessor State as a financial settlement between the two States. This no longer involves debts which originated previously, and the subject-matter of State succesion is what ultimately happens to the latter type of debt. Here, the problem has already been solved by the succession of States. This is not to say that such debts do not relate to State succession, but simply that they no longer relate to it.

(12) The predecessor State may have assumed debts with respect to either the potential successor State or a third State. In both cases, these are debts directly related to the succession of States, the difference being that, in the case of a debt of the predecessor State to the successor State, the only possibility to be envisaged is non-transmission of the debt, since deciding to transmit it to the successor State, which is the creditor, would mean cancellation or extinction of the debt. In other words, in this case, transmitting the debt would in fact mean not transmitting it, or extinguishing it. In any event, the basic subject-matter of State succession to debts is what becomes of debts assumed by the predecessor State, and by it alone; for it is the territorial change affecting the predecessor State, and it alone, that triggers the phenomenon of State succession. The change which has occurred in the extent of the territorial jurisdiction of the predecessor State raises the problem of the identity, continuity, diminution or disappearance of the predecessor State and thus causes a change in the territorial jurisdiction of the debtor State. The whole problem of succession of States in respect of debts is whether this change has any effects, and if so what effects, on debts contracted by the State in question.

Exclusion of debts of a non-State organ

(13) Debts occur in a variety of forms, the exact features of which should be ascertained in the interests of a sounder approach to the concept of State debt. The following brief review of different categories of debts may help to clarify that concept.

In State practice, in judicial decisions and in legal literature, a distinction is made in general between:

(*a*) State debts and debts of local authorities;

(*b*) General debts and special or localized debts;

(*c*) State debts and debts of public establishments, public enterprises and other quasi-State bodies;

(*d*) Public debts and private debts;

(*e*) Financial debts and administrative debts;

(*f*) Political debts and commercial debts;

(*g*) External debt and internal debt;

(*h*) Contractual debts and delictual or quasi-delictual debts;

(*i*) Secured debts and unsecured debts;

(*j*) Guaranteed debts and non-guaranteed debts;

(*k*) State debts and other State debts termed "odious debts", war debts or subjugation debts and, by extension, regime debts.

(14) A distinction should first of all be made between State debts and debts of local authorities. The latter are contracted not by an authority or department responsible to the central Government but by a public body which usually is not of the same political nature as the State and which is in any event inferior to the State. Such a local authority has a territorial jurisdiction which is limited, and is in any case less extensive than that of the State. It may be a federal unit, a province, a *Land*, a *département*, a region, a country, a district, an *arrondissement*, a *cercle*, a canton, a city or municipality, and so on. The local authority may also have a degree of financial autonomy in order to be able to borrow in its own name. It nevertheless remains subordinate to the State, not being a part of the sovereign structure which is recognized as a subject of public international law. That is why the defining of "local authority" is normally a matter of internal public law, and no definition of it exists in international law.

(15) Despite this, writers on international law have at times concerned themselves with the question of defining an authority such as "the commune". The occasion for this arose in particular when article 56 of the Regulations annexed to the Convention respecting the laws and customs of war on land, signed at The Hague on 18 October 1907,[322] and following the example of the 1899 Hague Convention, attempted to make provision for a system to protect public property, including property owned by municipalities *(communes)*, in case of war. The term "commune" then attracted the attention of writers.[323] In any event, a local authority is a

[322] J. B. Scott, *The Proceedings of the Hague Peace Conferences* (New York, Oxford University Press, 1920), vol. I, p. 623.

[323] O. Debbasch, *L'occupation militaire—Pouvoirs reconnus aux forces armées hors de leur territoire national* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 29-30 and footnotes 34 and 35.

public-law territorial body other than the State. Whatever debts it may contract by virtue of its financial autonomy are not legally debts of the State and do not bind the latter, precisely because of that financial autonomy.

(16) Strictly speaking, State succession should not be concerned with what happens to "local" debts because, prior to succession, such debts were, and after succession will be, the responsibility of the detached territory. Having never been assumed by the predecessor State, they cannot be assumed by the successor State. The territorially diminished State cannot transfer to the enlarged State a burden which it did not itself bear and had never borne. In this case, there is no subject-matter of State succession, which consists in the substitution of one State for another. Unfortunately, legal theory is not as clear on this point as would be desirable. There is in legal literature almost unanimous agreement on the rule that "local" debts should pass to the successor State. This may not be incorrect in substance, but at least it is badly expressed. If it is established absolutely that the debts in question are local debts, duly distinguished from other debts, then they will be debts proper to the detached territory. They will not of course be the responsibility of the diminished predecessor State, and from that standpoint the writers concerned are justified in their view. But it does not follow that they will become the responsibility of the successor State, as these writers claim. They were, and will continue to be, debts to be borne solely by the territory now detached. However, in the case of one type of State succession, namely, that of newly independent States, debts proper to the territory which are called "local" (in relation to the metropolitan territory of the colonial Power) would be assumed by the successor State, since in this case the detached territory and the successor State are one and the same.

(17) However, a careful distinction must be drawn between *local debts*, meaning those contracted by a territorial authority inferior to the State, for which the detached territory was responsible before the succession of States and for which it alone will be responsible afterwards, and debts which may be the responsibility of the State itself and for which the State is liable, incurred either for the general good of the national community or solely for the benefit of the territory now detached. Here there is subject-matter for the theory of State succession, the question being what happens to these two categories of debt on the occurrence of a succession of States. The comparison of general debts and special or "localized" debts which follows is intended to make the distinction clear.

(18) In the past, a distinction was made between "general debt", which was regarded as State debt, and regional or local debts contracted, as was noted above, by an inferior territorial authority, which was solely responsible for this category of debts. It is possible nowadays to envisage a further category, comprising what are called "special" or "relative" debts incurred by the predecessor State solely to serve the needs of the territory concerned. A clear distinction should therefore be drawn between a local debt (which is not a State debt) and a localized debt (which may be a State debt). The criterion for making this distinciton is whether or not the State itself contracted the loan earmarked for local use. It has been accepted to some extent in international practice that local debts remain entirely the responsibility of the part of territory which is detached, without the predecessor State's having to bear any portion of them. This is simply an application of the adage *res transit cum suo onere*.

(19) Writers differentiate between several categories of "local" debts, but do not always draw a clear dividing line between those debts and "localized" debts. This should be gone into with more precision. "Local" debt is a concept that may sometimes appear to be relative. Before a part of a State's territory detaches itself, debts are considered local because they have various links to the part of the territory. At the same time, however, there may also be an obvious linkage to the territorially diminished State. The question is whether the local character of the debt outweighs its linkage to the predecessor State. It is mainly a problem of determination of degree.

(20) The following criteria may be tentatively suggested for distinguishing between localized State debt and local debt:

(*a*) Who the debtor is: a local authority or a colony or, for and on behalf of either of those, a central Government;

(*b*) Whether the part of territory which is detached has financial autonomy, and to what degree;

(*c*) To what purpose the debt is to be put: whether for use in the part of territory which is detached;

(*d*) Whether there is a particular security situated in that part of territory.

Although these criteria are not absolutely sure guides, each of them can provide part of the answer to whether the debt should be considered more a local debt or more a localized State debt. The criteria show why legal theory on the question fluctuates. It is not always easy to ascertain whether a territorial authority other than the State really has financial autonomy and what the extent of its autonomy is in relation to the State. Moreover, even when the State's liability (in other words, the fact that the debt assumed is a State debt) is clear, it is not always possible to establish with certainty what the intended purpose of each individual loan is at the time when it is assumed, where the corresponding expenditure is to be effected, and whether the expenditure actually serves the interests of the detached territory.

(21) The personality of the debtor is still the least uncertain of the criteria. If a local territorial authority has itself assumed a debt, there exists a strong presumption that it is a local debt. The State is not involved, nor will it be any more involved simply because it becomes a predecessor State. Hence, the successor State will also not be involved. There will be no subject-matter for State succession here. If the debt is assumed by a central Government, but expressly on behalf of the detached local authority, it is legally a State debt. It could be called a *localized State debt* because the State intends the funds borrowed to be used for a specific part of the territory. If the debt was contracted by a central

Government on behalf of a colony, the same situation should in theory prevail.

(22) The financial autonomy of the detached part of territory is another useful criterion, although in practice it may prove difficult to draw absolutely certain conclusions from it. A debt cannot be considered local unless the part of territory to which it relates has a "degree" of financial autonomy. But does this mean that the province or colony must be financially independent? Or is it sufficient that its budget is separate from the general budget of the predecessor State? Again, is it sufficient that the debt is distinguishable, or, in other words, identifiable by the fact that it is included in the detached territory's budget? What, for example, of certain "sovereignty expenditures" covered by a loan which a central Government requires to be included in the budget of a colony and the purpose of which is to install settlers from the metropolitan country or to suppress an independence movement?[324] Inclusion of the loan in the local budget of the territory because of its financial autonomy does not suffice to conceal the fact that debts assumed for the purpose of making such expenditures are State debts.

(23) The third criterion, namely, the intended purpose and actual use of the debt contracted, in and of itself cannot provide the key for distinguishing between local (non-State) debts and localized (State) debts. A central Government, acting in its own name, may decide, just as a province would always do, to devote the loan which it has assumed to a local use. It is a State debt earmarked for territorial use. The criterion of intended purpose must be combined with the others in determining whether the debt is or is not a State debt. In other words, implicit in both the concept of local debt and that of localized debt is a presumption that the loan will actually be used in the territory concerned. This may or may not be a strong presumption. It is therefore necessary to determine the degree of linkage needed to justify a presumption that the loan will be used in the territory concerned. In the case of local debts, contracted by an inferior territorial authority, the presumption is naturally very strong: a *commune* or city generally borrows for itself and not in order to allocate the proceeds of its loan to another city. In the case of localized debts, contracted by the central Government with the intention of using them specifically for a part of territory, the presumption is obviously less strong.

(24) To refine the argument still further, it may be considered that from this third point of view there are three successive stages in the case of a localized State debt. First, the State must have intended the corresponding expenditures to be effected for the territory concerned (the principle of earmarking or intended use). Second, the State must actually have used the proceeds of the loan in the territory concerned (the criterion of actual use). Third, the expenditure must have been effected for the benefit and in the actual interest of the territory in question (the criterion of the interest or benefit of the territory). On these terms, abuses by a central Government could be avoided and problems such as those of regime debts or subjugation debts could be solved in a just and satisfactory manner.

(25) An additional item of evidence is the possible existence of securities or pledges for the debt. This is the last criterion. A debt may be secured, for instance, by real property or fiscal resources, and the property may be situated or the taxes levied either throughout the territory of the predecessor State or only in the part of the territory detached from that State. This may provide additional indications as to whether the debt is or is not a State debt—but the criterion should be cautiously applied for this purpose, since both the central Government and the province may offer securities of this nature for their respective debts.

(26) When it has been ascertained with sufficient certainty that the debt is a State debt, it remains to be determined—and this is the subject-matter of State succession to debts—what finally happens to the debt. The successor State is not necessarily liable for it. For example, in the case of a State debt secured by property belonging to the detached territory, it is by no means certain that the loan was contracted for the benefit of the detached territory. Perhaps the predecessor State had no other property which could be used as security. It would therefore be unfair to place the burden of such a debt on the successor State, simply because the territory which has become joined to it had the misfortune to be the only part capable of providing the security. In any case, such a debt is a State debt (not a local debt) for which the predecessor State was liable. In the case of debts secured by local fiscal resources, the presumption is stronger. As this form of security is possible in any part of the territory of the predecessor State (unless special revenue is involved), the linkage with the part of the territory which has been detached is specific in this case. However, as in the case of debts secured by real property, the debt may be either a State debt or a local debt, since the State and the province can both secure their respective debts with local fiscal resources.

(27) The International Law Association, for its part, subdivides public debts into three categories:

(a) *National debt:* "The national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any particular assets";

(b) *Local debt:* "Local debts, that is, debts either raised by the central government for the purposes of expenditure in particular territories, or raised by the particular territories themselves";

(c) *Localized debt:* "Localized debts, that is, debts raised by a central government or by particular territorial government with respect to expenditure on particular projects in particular territories".[325]

(28) In conclusion, a *local debt* can be said to be a debt: which is contracted by a territorial authority inferior to the State, to be used by that authority in its own territory; which territory has a degree of financial autonomy, with the result that the debt is identifiable.

[324] There is the problem of "odious" debts, regime debts, war debts or subjugation debts; see below, paras. (41)-(43) of this commentary.

[325] ILA, *Report of the Fifty-fourth Conference, held at The Hague, 23rd-29th August, 1970* (London, 1971), p. 108.

In addition, a "*localized debt*" is a *State* debt which is used specifically by the State in a clearly defined portion of territory. Because State debts are not generally "localized", it is considered that they should be described as such if that is in fact what they are. This is superfluous in the case of local debts, all of which are "localized", in that they are situated and used in the territory. The reason to specify that a debt is "localized" is that it is a State debt which happens to be, by way of exception, geographically "situated". In short, while all local debts are by definition "localized", State debts usually are not; when they are, this must be expressly indicated so that it will be known that such is the case.

(29) The present part is limited to State debts, excluding from this term any debts which might be contracted by public enterprises or public establishments. It is sometimes difficult, under the domestic law of certain countries, to distinguish the State from its public enterprises. When it does prove possible to do so, it is even more difficult not to consider debts contracted by a public establishment in which the State itself has a financial participation to be State debts. There arises, first of all, a problem in defining a public establishment or public enterprise.[326] These are entities distinct from the State which have their own personality and usually a degree of financial autonomy, are subject to a *sui generis* juridical regime under public law, engage in an economic activity or provide a public service and have a public or public-utility character. The Special Rapporteur on State responsibility described them as "public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions".[327] In the *Certain Norwegian Loans* case, considered by the International Court of Justice, the agent of the French Government stated:

> In internal law . . ., a public establishment is brought into existence in response to a need for decentralization; it may be necessary to allow a degree of independence to certain establishments or bodies, either for budgetary reasons or because of the purpose they serve; for example, an assistance function or a cultural purpose. This independence is achieved through the granting of legal personality under internal law.[328]

(30) In its draft on State responsibility, the Commission has settled the question whether, in respect of international responsibility of the State, the debt of a public establishment can be considered a State debt. In respect of State succession, however, the answer to the question whether the debt of such a body is a State debt can obviously only be in the negative. The category of debts of public establishments will therefore be excluded from the scope of the present Part of the draft in the same way as that of debts of inferior territorial authorities, despite the fact that both are of a public character. This public character does not suffice to make the debt a State debt, as will be seen below in the case of another category of debts.

(31) The preceding paragraphs show that the public character of a debt is absolutely necessary, but by no means sufficient, to identify it as a State debt. A "public debt" is an obligation binding on a public authority, as opposed to a private body or an individual. However, the fact that a debt is called "public" does not make it possible to identify more completely the public authority which contracted it, so that it may be the State, a territorial authority inferior to it, or a public institution or establishment distinct from the State. The term "public debt" (as opposed to private debt) is therefore not very helpful in identifying a State debt. The term is too broad, and covers not only State debts, which are the subject of the present part, but also the debt of other public entities, whether or not of a territorial character.

(32) Financial debts are associated with the concept of credits. Administrative debts, on the other hand, result automatically from the activities of the public services, without involving any financing or investment. The ILA cites several examples:[329] certain expenses of former State services; debt-claims resulting from decisions of public authorities; debt-claims against public establishments of the State or companies belonging to the State; building subsidies payable by the State; salaries and remuneration of civil servants.[330] While financial debts may be either public or private, administrative debts can only be public.

(33) Regarding political debts and commercial debts, while commecial debts may be State debts, debts of local authorities or public establishments or private debts, political debts are always State debts. The term

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[326] These two terms will be used interchangeably, even though the legal regime for the bodies in question may be different under the internal law of certain countries. In French and German administrative law, the "*établissement public*" or "*öffentliche Anstalt*" is distinguished from the "*entreprise publique*" or "*öffentliche Unternehmung*". English law and related systems hardly seem to make any distinction between a "public corporation", an "enterprise", an "undertaking" and a "public undertaking" or "public utility undertaking". Spain has "*institutos públicos*", Latin America has "*autarquías*", Portugal has "*estabelecimentos públicos*" or "*fiscalias*" and Italy has "*enti pubblici*", "*imprese publiche*", "*aziende autonome*" and so on. See W. Friedmann, ed., The Public Corporation: *A Comparative Symposium* (London, Stevens, 1954), vol. 1.

See also *Yearbook . . . 1973*, vol. II, pp. 59-65, document A/CN.4/267, part four, arts. 32, 33 and 34.

International judicial bodies had to consider the definition of public establishments, in particular:

(*a*) In an arbitral award by Beichmann (Case of German reparations: *Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles* (arbitrator F. W. N. Beichmann), publication of the Reparation Commission, annex 2145a (Paris, 1924) and United Nations, *Reports of Arbitral Awards*, vol. I (United Nations publication, Sales No. 48.V.2), pp. 453 *et seq.*);

(*b*) In a decision of the United Nations Tribunal in Libya (Case of the institutions, companies and associations mentioned in article 5 of the agreement concluded on 28 June 1951 between the United Kingdom and Italian Governments concerning the disposal of certain Italian property in Libya: decision of 27 June 1955 (*ibid.*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 390 *et seq.*); and

(*c*) In a decision of the P.C.I.J. in a case relating to a Hungarian public university establishment (*Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* (The Péter Pázmány University *v.* The State of Czechoslovakia), Judgment of 15 December 1933 (*P.C.I.J.*, Series A/B, No. 61, pp. 236 *et seq.*)).

[327] *Yearbook . . . 1971*, vol. II (Part One), p. 254, document A/CN.4/246 and Add.1-3, para. 163.

[328] *I.C.J. Pleadings, Certain Norwegian Loans* (France *v.* Norway) (1955), vol. II, p. 72.

[329] ILA, *op. cit.*, pp. 118-121.

[330] See Poldermans *v.* State of the Netherlands, judgement of 8 December 1955 (*Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 114-115).

"political debts", as described by one writer, should be taken to refer to:

> . . . those debts for which a State has been declared liable or has acknowledged its liability *to another State* as a result of *political events*. The most frequent case is that of a debt imposed on a defeated State by a peace treaty (war reparations, etc.). Similarly, a war loan made by one State to another State gives rise to a political debt.[331]

The same writer adds that "a *political* debt is one which exists only between *Governments, between one State and another. The creditor is a State, and the debtor is a State. It is of little consequence whether the debt arises from a loan or from war reparations*".[332] He contrasts political debts, which establish between the creditor and the debtor a relationship between States, with commercial debts, which "are those arising from a loan contracted by a State with *private parties*, whether bankers or individuals".[333]

(34) The ILA makes distinctions between debts according to their form, their purpose and the status of the creditors:

> The loans may be made by:
>
> (*a*) Private individual lenders by means of individual contracts with the government;
>
> (*b*) Private investors who purchase "domestic" bonds, that is, bonds which are not initially intended for purchase by foreign investors . . .;
>
> (*c*) Private investors who purchase "international" bonds, that is, bonds issued in respect of loans floated on the international loan market and intended to attract funds from foreign countries;
>
> (*d*) Foreign governments, for general purposes and taking the form of a specific contract of credit;
>
> (*e*) Foreign governments, for fixed purposes and taking the form of a specific contract of loan;
>
> (*f*) International organizations.[334]

(35) The distinction between external debt and internal debt is normally applied only to *State debt*, although it could conceivably be applied to other public debts or even to private debts. An internal debt is one for which the creditors are nationals of the debtor State,[335] while external debt includes all debts contracted by the State with other States or with foreign bodies corporate or individuals.

(36) Delictual debts, arising from unlawful acts committed by the predecessor State, raise special problems with regard to succession of States, the solution of which is governed primarily by the principles relating to international responsibility of States.[336]

(37) Although all debts, whether they are private, public or State debts, may or may not be secured in some manner, this part deals exclusively with State debts. In that connection, the notion of secured debt is an extremely important one. A distinction must be made between two categories of debt. First, there are State debts which are specially secured by certain tax funds, it having been decided or agreed that the revenue from certain taxes would be used to secure the services of the State debt. Second, there may be cases in which State debts are specially secured by specific property, the borrowing State having in a sense mortgaged certain national assets.

(38) A State's liability can arise not only from a loan contracted by that State itself but also from a guarantee which it gives in respect of the debt of another party, which may be a State, an inferior territorial authority, a public establishment or an individual. The World Bank, when granting a loan to a dependent territory, often requires a guarantee from the administering Power. Thus, when the territory in question attains independence, two States are legally liable for payment of the debt.[337] However, a study of the actual record of loans contracted with IBRD shows that a succession of States does not alter the previously existing situation. The dependent territory which attains independence remains the principal debtor, and the former administering Power remains the guarantor. The only difference, which has no real effect on what happens to the debt, is that the dependent territory has changed its legal status and become an independent State.

(39) The distinction to be made here serves not only to separate two complementary concepts but also to distinguish among a whole set of terms which are used at various levels. For the sake of strict accuracy, a contrast might be attempted between State debts and *regime debts*, since the latter, as the term indicates, are debts contracted by a political regime, or a Government having a particular political form. However, the question here is not whether the Government concerned has been replaced in the same territory by another Government with a different political orientation, since that would involve a mere succession of Governments in which regime debts may be repudiated. On the contrary, what is here involved is a succession of States, or, in other words, the question whether the regime debts of a predecessor State pass to the successor State. For the purposes of this part, regime debts must be regarded as State debts. The law of State succession does not concern itself with Governments or any other organs of the State, but with the State itself. Just as internationally wrongful acts committed by a Government give rise to State responsibility, so also regime debts, i.e., debts contracted by a Government, are State debts.

(40) In the opinion of one writer, what is meant by regime debts is:

> debts contracted by the dismembered State in the temporary interest of a particular political form, and the term can include, in peacetime,

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[331] G. Jèze, "Les défaillances d'Etat", *Recueil des cours de l'Académie de droit international de La Haye, 1935-III* (Paris, Sirey, 1936), vol. 53, p. 383.

[332] *Ibid.*, pp. 383-384.

[333] *Ibid.*, p. 383.

[334] ILA, *op. cit.*, p. 106.

[335] See D. Bardonnet, *La succession d'Etats à Madagascar—Succession au droit conventionnel et aux droits patrimoniaux* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 271 and 276.

[336] *Ibid.*, p. 305. The author refers (p. 270) to A. B. Keith (*The Theory of State Succession—with Special Reference to English and Colonial Law* (London, Waterlow, 1907), pp. 58 *et seq.*) with regard to succession of States in respect of delictual or quasi-delictual debts. See also ILA, *op. cit.*, p. 122 (appendix C, "Debts of the Belgian Congo", Brussels Court of Appeal, *Bougnet et Hoc* v. *Belgium*, judgement of 4 December 1963).

[337] G. R. Delaume, *Legal Aspects of International Lending and Economic Development Financing* (Dobbs Ferry N.Y., Oceana, 1967), p. 321; K. Zemanek, "State succession after decolonization", *Recueil des cours . . ., 1965-III* (Leyden, Sijthoff, 1965), vol. 116, pp. 259-260.

subjugation debts specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, *war debts*.[138]

This is one application of the broader theory of "odious" debts, to which reference will be made in the ensuing paragraphs.

The question of "odious debts"

(41) In his ninth report,[139] the Special Rapporteur included a chapter entitled "Non-transferability of 'odious' debts". That chapter dealt, first, with the definition of "odious debts". The Special Rapporteur recalled *inter alia* the writings of jurists who referred to "war debts" or "subjugation debts"[140] and those who referred to "regime debts".[141] For the definition of odious debts, he proposed an article C, which read as follows:

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

(*a*) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;

(*b*) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

(42) Second, the chapter dealt with the determination of the fate of odious debts. The Special Rapporteur reviewed State practice concerning "war debts", including a number of cases of the non-passing of such debts to a successor State,[142] as well as cases of the passing of such debts.[143] He further cited cases of State practice concerning the passing or non-passing to a successor State of "subjugation debts".[144] He proposed the following article D, concerning the non-transferability of odious debts:

Article D. Non-transferability of odious debts

[Except in the case of the uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State.

(43) The Commission, having discussed articles C and D, recognized the importance of the issues raised in connection with the question of "odious" debts, but was of the opinion initially that the rules formulated for each type of succession of States might well settle the issues raised by the question and might dispose of the need to draft general provisions on it. In completing the second reading of the draft, the Commission confirmed that initial view.

Definition of a State debt

(44) Having in mind the foregoing considerations, the Commission adopted the text of article 31, which contains the definition of State debt for the purposes of the articles in part IV of the draft. The reference in the text of the article to the "articles in the present Part" conforms to usage throughout the draft and in particular to the language of the corresponding provisions in parts II and III, namely, articles 8 and 19. The text of article 31 refers to a "financial obligation" in order to make it clear that the debt in question involves a monetary aspect. It further specifies that it is any financial obligation of a State "towards another State, an international organization or any other subject of international law" which may be characterized as an international financial obligation.

(45) As is indicated above,[145] the inclusion of an additional provision extending the definition of State debt to cover "any other financial obligation chargeable to a State" was rejected by the Commission in second reading, by a tied vote. That second category of financial obligation was intended to cover State debts whose creditors are not subjects of international law. During the debate on this article in the Commission, it was generally agreed that the debts owed by a State to private creditors, whether natural or juridical persons, were legally protected and were not prejudiced by a succession of States. This position is reflected in the new article 6 adopted at the present session as a safeguard clause and included among the "General provisions" of part I of the draft.

(46) In the opinion of those members of the Commission who opposed the inclusion in article 31 of sub-

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[138] C. Rousseau, *Droit international public* (Paris, Sirey, 1977), vol. III, p. 458.

[139] *Yearbook . . . 1977*, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1.

[140] For example, A. Sánchez de Bustamante y Sirvén, *Derecho Internacional Público* (Havana, Carasa, 1936), vol. III, pp. 279-280; and P. Fauchille, *Traité de droit international public* (8th ed. of *Manuel de droit international public* by H. Bonfils) (Paris, Rousseau, 1922), vol. I, p. 352.

[141] For example, G. Jèze, *Cours de science des finances et de législation financière française*, 6th ed. (Paris, Giard, 1922), vol. I, part I, pp. 302-305, 327.

[142] The report mentions, *inter alia*, the following examples: article XXIV of the Treaty of Tilsit between France and Prussia (see E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931), p. 91); the annexation of the Transvaal ("South African Republic") by the United Kingdom (*ibid.*, pp. 380-396, cf. J. de Louter, *Le droit international public positif* (Oxford, University Press, 1920), vol. I, p. 229); peace treaties following the end of the First and Second World Wars, in particular art. 254 of the Treaty of Versailles (*British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, pp. 124-125); art. 203 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 405-408); art. 141 of the Treaty of Neuilly-sur-Seine (*ibid.*, p. 821); art. 186 of the Treaty of Trianon (*ibid., 1920* (1923), vol. CXIII, pp. 556-560); art. 50 of the Treaty of Lausanne (League of Nations, *Treaty Series*, vol. XXVIII, pp. 41 and 43); and annexes X and XIV of the Treaty of Peace with Italy (United Nations, *Treaty Series*, vol. 49, pp. 209, 225).

[143] For example, the 1720 treaty between Sweden and Prussia (see Feilchenfeld, *op. cit.*, p. 75, footnote 6); the unification of Italy (*ibid.*, p. 269); and the assumption by Czechoslovakia, for a short period of time, of certain debts of Austria-Hungary (see D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. I: *Internal Relations*, pp. 420-421).

[144] The Special Rapporteur made reference to the 1847 treaty between Spain and Bolivia (see below, para. (11) of the commentary to art. 36); the question of Spanish debts with regard to Cuba in the context of the 1898 Treaty of Paris between Spain and the United States of America (see Feilchenfeld, *op. cit.*, pp. 337-342 and Rousseau, *op. cit.*, p. 459); art. 255 of the Treaty of Versailles (see footnote 342 above) and the Reply of the Allied and Associated Powers concerning the German colonization of Poland (*British and Foreign State Papers, 1919 (op. cit.)*, p. 290); the question of Netherlands debts with regard to Indonesia in the context of the 1949 Round Table Conference and of the subsequent 1956 denunciation by Indonesia (see below, paras. (16)-(19) of the commentary to art. 36); and the question of French debts in Algeria (see below, para. (36) of the commentary to art. 36).

[145] See footnote 319.

paragraph (*b*), the definition of State debt should be limited to financial obligations arising at the *international level*, that is to say, between subjects of international law. Debts owed by a State to private creditors, in their view, fell outside the scope of the present draft. Although protected, such debts were not the subject of the law of succession of States. Furthermore, in the view of some of those members, the proposed subparagraph (*b*) should not extent to "any other financial obligation chargeable to a State" when the creditor was an individual who was a national of the debtor predecessor State, whether a natural or juridical person. On the other hand, the members who favoured subparagraph (*b*) stressed the volume and importance of the credit currently extended to States from foreign private sources. It was considered that the deletion of subparagraph (*b*) would lead to a limitation of the sources of credit available to States and international organizations, which would be detrimental to the interests of the international community as a whole and, in particular, to those of the developing countries that were in dire need of external financing for their development programmes and whose easier access to private capital markets was one of the objectives of the "North-South dialogue" on economic matters.[186] It was also indicated by some of those members that the deletion of subparagraph (*b*) would create an inconsistency between the definition of State debt and that of State property in article 8, which extended to the property, rights and interests that were owned by the predecessor State, in accordance with its internal law, at the date of the succession of States, without distinguishing whether debtors were subjects of international law or not.

Article 32. Effects of the passing of State debts

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

Commentary

(1) Articles 9 and 20 lay down a rule confirming the dual juridical effect of a succession of States upon the respective rights of the predecessor State and the successor State as regards, respectively, State property and State archives passing from the former to the latter, consisting in the extinction of the rights of the predecessor State to the property or archives in question and the simultaneous arising of the rights of the successor State to that property or those archives. Article 32 embodies a parallel rule regarding the obligations of the predecessor and successor States in respect of State debts which pass to the successor State in accordance with the provisions of the articles in part IV.

(2) It should be stressed that this rule applies only to the State debts which actually pass to the successor State "in accordance with the provisions of the articles in the present Part". Particularly important among such provisions is article 34, which, as a complement to article 32, guarantees the rights of creditors.

Article 33. Date of the passing of State debts

Unless otherwise agreed or decided, the date of the passing of State debts is that of the succession of States.

Commentary

(1) At the present session, the Commission decided to include in the final draft the present article, which corresponds to articles 10 and 21 concerning, respectively, the date of the passing of State property and of State archives. Article 33 is its own justification and fills what had been a gap in the past on State debts.

(2) It should, however, be noted that the assumption by the successor State from the date of the succession of States of the servicing of the State debt that passes to it will probably not be feasible *in practice*. The predecessor State may continue to service the debt directly for some period of time, and that for practical reasons, since the debt, as a State debt, will have given rise to the issuance of acknowledgements signed by the predecessor State, which is bound to honour its signature. Before the successor State can honour directly the acknowledgements pertaining to a debt that passes to it, it must endorse them; until that operation, which constitutes novation in the legal relationship between the predecessor State and the creditor third State, has been completed, it is the predecessor State which remains accountable to the creditors for its own debt.

(3) There can, however, be no question of such temporal or practical constraints altering the legal principle of the passing of the debt on the date of the succession of States. In reality, until such time as the successor State endorses or takes over the acknowledgements of the debts that pass to it, it will pay the predecessor State the servicing charges associated with those debts, and the predecessor State will provisionally continue to discharge the debts to the creditor third State.

(4) The principal purpose of article 33 is to show that, however long the transitional period required for the resolution of the organizational problems associated with the replacement of one debtor (the predecessor State) by another (the successor State), the legal principle is clear and must be observed: interest accrues on the State debt that passes to the successor State, and that debt is chargeable to that State, from the date of succession of States. Should a predecessor State which has been released from certain debts by virtue of the present articles none the less provisionally continue, for material reasons, to service those debts to the creditors, it must receive due repayment from the successor State.

Article 34. Effects of the passing of State debts with regard to creditors

1. A succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor

[186] Originally, the Conference on International Economic Co-operation, which opened in Paris in December 1975.

State or States, as the case may be, against a third State, an international organization or any other subject of international law asserting a claim unless:

(*a*) the consequences of that agreement are in accordance with the provisions of the present Part; or

(*b*) the agreement has been accepted by that third State, international organization or other subject of international law.

Commentary

(1) In part II (State property) of the present draft articles, the Commission has adopted a rule, i.e., article 12, for the protection of the property of a third State from any "disturbance" as a result of territorial change through a succession of States. If article 12 were to be given a narrow interpretation, it could be said to relate only to tangible property, such as land, buildings, consulates and possibly bank deposits, whose location in the territory of the predecessor State in accordance with article 12 could, by their nature, be determined. However, no restriction was placed on the expression "property, rights and interests" of the third State that would enable third State debt-claims which constitute intangible property, whose location it might prove difficult to determine, to be excluded from it. If, therefore, article 12 is taken to refer also to third State debt-claims, this would mean that the debts of the predecessor State corresponding to those debt-claims of the third State should in no way be affected by the succession of States. In other words, it would be pointless to study the general problems of succession of States in respect of debts, since the debts of the predecessor State (which are nothing more than the debt-claims of the third State) must remain in a strict *status quo*, which cannot be changed by the succession of States.

(2) What article 12 really means is that the debt-claims of the third State must not cease to exist or suffer as a result of the territorial change. Prior to the succession of States, the debtor State and the creditor State were linked by a specific, legal debtor/creditor relationship. The problem which then arises is whether the succession of States is, in this case, intended not only to create and establish a legal relationship between the debtor predecessor State and the successor State, enabling the former to shift on to the latter all or part of its obligation to the creditor third State, but also to create and establish a new "successor State/third State" legal relationship to replace the "predecessor State/third State" relationship in the proportion indicated by the "predecessor State/successor State" relationship with respect to assumption of the obligation. The answer must be that succession of States in respect of State debts can create a relationship between the predecessor State and the successor State with regard to debts which linked the former to a third State, but that it cannot, in itself, establish any direct legal relationship between the creditor third State and the successor State, should the latter "assume" the debt of its predecessor. From this point of view, the problem of succession of States in respect of debts is much more akin to that of succession of States in respect of treaties than to that of succession in respect of property.

(3) Considering here only the question of the transfer of obligation, and not that of the transer of rights, there are certainly grounds for stating that a "succession of States", in the strict sense, takes place only when by reason of a territorial change certain international obligations of the predecessor State to third parties pass to the successor State solely by virtue of a norm of international law providing for such passing, independently of any manifestation of will on the part of the predecessor State or the successor State. But the effect, in itself, of the succession of States should stop there. A new legal relationship is established between the predecessor State and the successor State with regard to the obligation in question. However, the existence of this relationship does not have the effect either of automatically extinguishing the former "predecessor State/third State" relationship (except where the predecessor State entirely ceases to exist) or of replacing it with a new "successor State/third State" relationship in respect of the obligation in question.

(4) If, then, it is concluded that there is a passing of the debt to the successor State (in a manner which it is precisely the main purpose of the succession of States to determine), it cannot be argued that it must automatically have effects in relation to the creditor third State in addition to the normal effects it will have vis-à-vis the predecessor State. As in the case of succession of States in respect of treaties, there is a personal equation involved in the matter of succession in respect of State debts. The legal relationship which existed between the creditor third State and the predecessor State cannot undergo a twofold novation, in a triangular relationship, which would have the effect of establishing a direct relationship between the successor State and the third State.

(5) The problem is not a theoretical one, and its implications are important. In the first place, if the successor State is to assume part of the debts of the predecessor State, in practice this often means that it will pay its share to the predecessor State, which will be responsible for discharging the debt to the creditor third State. The predecessor State thus retains its debtor status and full responsibility for the old debt. This has frequently occurred, if only for practical reasons, the debt of the predecessor State having led to the issue of bonds signed by that State. For the successor State to be able to honour those bonds directly, it would have to guarantee them; until that operation, which constitutes the novation in legal relations, has taken place, the predecessor State remains liable to the creditors for the whole of its debts. Nor is this true only in cases where the territorial loss is minimal and where the predecessor State is bound to continue servicing the whole of the old debt. Moreover, if the successor State defaults, the predecessor State remains responsible to the creditor third State for the entire debt until an express novation has taken place to link the successor State specifically and directly to the third State.

(6) The above position has been supported by an author, who wrote:

> If the annexation *is not total*, if there is *partial* dismemberment, there can be no doubt on the question: after the annexation, as before it, the bondholders have only one *creditor*, namely the State which floated the loan . . . Apportionment of the debt between the successor State and the dismembered State does not have the immediate effect of automatically making the successor State the

direct debtor vis-à-vis the holders of bonds issued by the dismembered State. To use legal terms, the *right* of the creditors to *institute proceedings* remains as it was before the dismemberment; only the contribution of the successor State and of the dismembered State is affected; it is a legal relationship *between States*.

. . .

Annexation or dismemberment does not *automatically* result in *novation through a change of debtor*.

In practice, it is desirable, *for all the interests involved*, that the creditors should have as the *direct* debtor the *real and principal* debtor. Treaties concerning cession, annexation or dismemberment should therefore settle this question. In fact, that is what usually occurs.

. . .

In case of *partial* dismemberment, and when the portion of the debt assumed by the annexing State is small, the *principal and real* debtor is the dismembered State. It is therefore preferable not to alter the debt, but to leave the dismembered State as the *sole debtor* to the holders of the bonds representing the debt. The annexing State will pay its contribution to the dismembered State and the latter *alone* will be responsible for servicing the debt (interest and amortization), *just as before the dismemberment*.

The contribution of the annexing State will be paid by the latter in the form either of a *periodic payment* . . . or of a *one-time capital payment*.[147]

[147] G. Jèze, "L'emprunt dans les rapports internationaux—La répartition des dettes publiques entre Etats au cas de démembrement du territoire", *Revue de science et de législation financières* (Paris), vol. XIX, No. 1 (January-March 1921), pp. 67-69. Jèze also quotes A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pedone, 1905), vol. I, p. 287.

A contrary position was taken, however, by A. N. Sack, who formulated such rules as the following:

"*No part of an indebted territory is bound to assume or pay a larger share than that for which it is responsible. If the Government of one of the territories refuses to assume, or does not actually pay, the part of the old debt for which it is responsible, there is no obligation on the other cessionary and successor States or on the diminished former State to pay the share for which that territory is responsible.*

"This rule leaves no doubt concerning cessionaries and successors which are sovereign and independent States; they cannot be required to guarantee jointly the payments for which each of them and the diminished former State (if it exists) are responsible, or to assume any part of the debt which one of them refuses to assume.

"However, the following question then arises: is the former State, if it still exists and if only part of its territory has been detached, also released from such an obligation?

". . .

"The argument that the diminished 'former' State remains the principal debtor vis-à-vis the creditors and, as such, has a right of recourse against the cessionary and successor States is based on [an erroneous] conception [according to which] the principle of succession to debts is based on the relations of States between themselves . . .

". . .

"Thus, in principle, the diminished former State has the right to consider itself responsible only for that part of the old debt for which it is responsible in proportion to its contributive capacity.

". . .

"*The creditors have no right of recourse (or right to take legal action) either against the diminished former State as regards those parts of the old debt for which the . . . successors are responsible or against one of the . . . successors as regards those parts of the old debt for which another . . . successor or the diminished former State is responsible.*

". . . The debtor States have the right to apportion among all the indebted territories what was formerly their common debt. This right belongs to them independently of the consent of the creditors. They are therefore bound to pay to the creditors only that part of the old debt for which each of them is responsible." (A. N. Sack, "La succession aux dettes publiques d'Etats", *Recueil des cours . . . , 1928-III* (Paris, Hachette, 1929), vol. 23, pp. 303-304, 306 and 320).

(7) For the sake of the argument, reference may be made to the case of a State debt which has come into existence as a result of an agreement between two States. In this case, the creditor third State and the debtor predecessor State may set out their relationship in a treaty. The fate of that treaty, and thus of the debt to which it gave rise, may have been decided in a "devolution agreement" concluded between the predecessor State and the successor State. The creditor third State may, however, prefer to remain linked to the predecessor State, even though it is diminished, if it considers it more solvent than the successor State. In consequence of its debt-claim, the third State possessed a right which the predecessor State and the successor State cannot dispose of at their discretion in their agreement. The general rules of international law concerning treaties and third States (in other words, articles 34 to 36 of the 1969 Vienna Convention) quite naturally apply in this case. It must, of course, be recognized that the agreement between the predecessor State and the successor State concerning the passing of a State debt from one to the other is not in principle designed to be detrimental to the creditor third State, but rather to ensure the continuance of the debt incurred to that State.

(8) However, as the Commission observed with respect to devolution agreements, in the case of succession of States in respect of treaties:

But the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.[148]

The Commission further stated:

A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported *assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory*.* It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The [1969] Vienna Convention contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which *as a treaty*, can be binding only as between the predecessor and the successor States and the direct legal effects of which are necessarily confined to them.

. . .

That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an *offer* to continue the predecessor State's treaties, which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties.[149]

[148] *Yearbook . . . 1974*, vol. II (Part One), p. 184, document A/9610/Rev.1, chap. II, sect. D, para. (5) of the commentary to art. 8.

[149] *Ibid.*, paras. (6) and (11) of the commentary.

(9) A similar situation exists as to the effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes the debts of the predecessor State, however consented to by the latter. Does a unilateral declaration by the successor State that it assumes all or part of the debts of the predecessor State following a territorial change mean, *ipso facto*, a novation in the legal relationship previously established by treaty between the creditor third State and the debtor predecessor State? Such a declaration is unquestionably to the advantage of the predecessor State, and it would be surprising and unexpected if that State were to find some objection to it since it has the practical effect of easing its debt burden. It is, at least in principle, also to the advantage of the creditor third State, which might have feared that all or part of its debt-claim would be jeopardized by the territorial change. However, the creditor third State might have a political or material interest in refusing to agree to substitution of the debtor or to assignment of the debt. Moreover, under most national systems of law, the assignment of debts is, of course, generally impossible. The creditor State has a subjective right, which involves a large measure of *intuitus personae*. It may, in addition, have a major reason for refusing to agree to assignment of the debts—for example, if it considers that the successor State, by its unilateral declaration, has taken over too large (or too small) a share of the debts of the predecessor State, with the result that the declaration may jeopardize its interests in view of either the degree of solvency of one of the two States (the predecessor or the successor) or the nature of the relations which the third State has with each of them, or for any other reason. More simply still, the third State cannot feel itself automatically bound by the unilateral declaration of the successor State, since that declaration might be challenged by the predecessor State with regard to the amount of the debts which the successor State has unilaterally decided to assume.

(10) Having in mind the foregoing considerations relating to creditor third States, which are equally valid in cases where the creditors are not States, the Commission has adopted article 34 on the effects of the passing of State debts with regard to creditors. *Paragraph 1* of the article enunciates the basic principle that a succession of States does not, by that phenomenon alone, affect the rights and obligations of creditors. Under this paragraph, while a succession of States may have the effect of permitting the debt of the predecessor State to be apportioned between that State and the successor State or to be assumed in its entirety by either of them, it does not, of itself, have the effect of binding the creditor. Furthermore, a succession of States does not, of and by itself, have the effect of giving the creditor an established claim equal to the amount of the State debt which may pass to the successor State; in other words, the creditor does not, in consequence only of the succession of States, have a right of recourse or a right to take legal action against the State which succeeds to the debt. The word "creditors" covers such owners of debt-claims as fall within the scope of the articles in part IV and should be interpreted to mean *third creditors*, thus excluding successor States or, when appropriate, natural or juridical persons under the jurisdiction of the predecessor or successor States. Although this paragraph will in practice apply mostly to the "rights" of creditors, it refers as well to "obligations" in order not to leave a possible lacuna in the rule nor allow it to be interpreted as meaning that a succession as such could affect that aspect of the debt relationship involving the creditor's obligations arising out of the State debt.

(11) *Paragraph 2* envisages the situation where the predecessor State and the successor State or, as the case may be, the successor States themselves conclude an agreement specifically for the passing of State debts. It is evident that such an agreement has by itself no effect on the rights of creditors. To have such an effect, the consequences of such an agreement must be in accordance with the provisions of the present part. This is the rule contained in *subparagraph* (a). It should be stressed that subparagraph (*a*) deals only with the *consequences* of the agreement and not with the agreement itself, whose effect would be subject to the general rules of international law concerning treaties and third States: articles 34 and 36 of the 1969 Vienna Convention. The effects of such an agreement can also be recognized if the creditor third State or international organization has accepted the agreement on the passing of debts from the predecessor to the successor States. In other words, succession of States does not, *of itself*, have the effect of automatically releasing the predecessor State from the State debt (or a fraction of it) assumed by the successor State or States unless the consent, express or tacit, of the creditor has been given. This is provided for in *subparagraph* (b). There may be cases where the creditors feel more secured by an agreement between a predecessor State and a successor State or between successor States concerning the passing of State debts because, for example, of the greater solvency of the successor State or States as compared with the predecessor State. It would therefore be to the advantage of creditors to be given the possibility, provided for in subparagraph (*b*), of accepting such an agreement.

(12) Since the rule embodied in article 34 concerns the effects of the passing of State debts with regard to creditors, paragraph 2 is drafted in such a way as to preclude the invoking of the agreement in question against creditors unless one or another of the conditions set out in subparagraphs (*a*) and (*b*) is fulfilled. At the present session the Commission completed the introductory sentence of paragraph 2 so that it not only refers to "a third State or an international organization" but also to other subjects of international law, since the rule applies equally to such subjects.

SECTION 2. PROVISIONS CONCERNING SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Commentary

In parts II (State property) and III (State archives) of the draft articles, the Commission decided to draft the provisions relating to each type of succession of States following the broad categories of succession which it had adopted for the draft articles on succession of States in respect of treaties, yet introducing certain modifications to those categories in order to accom-

modate the characteristics and requirements proper to the topic of succession of States in respect of matters other than treaties. The Commission, therefore, established a typology consisting of the following five types of succession: (*a*) transfer of part of the territory of a State; (*b*) newly independent States; (*c*) uniting of States; (*d*) separation of part or parts of the territory of a State; and (*e*) dissolution of a State. In the present part also, the Commission has attempted to follow, in so far as appropriate, the typology of succession of States adopted in parts II and III. Thus the titles of section 2 and of the draft articles therein correspond to those of section 2 of parts II and III and of the draft articles contained therein.

Article 35. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

Commentary

(1) The category of succession of States which article 35 deals with corresponds to that covered by articles 13 and 25. There is divergency in State practice and in legal literature on the legal principle to be applied concerning the passing (or non-passing) of the State debt of the predecessor State to the successor State for the type of succession envisaged in article 35. In the following paragraphs, reference will be made to doctrinal views and to examples of State practice and judicial decisions concerning the fate of the general debt of a State as well as that of localized State debts.

(2) Commenting on the uncertainties of the doctrine regarding the general public debt contracted for the general needs of a dismembered State, one writer summed up the situation as follows:

> . . . what conclusion is to be drawn with regard to the *general public debt* of the dismembered State? Opinions on this differ widely. There are several schools of thought: (1) The cession by a State of a fraction of its territory should have no effect on its public debt; the debt remains wholly its responsibility, for the dismembered State continues to exist and retains its individuality; it must therefore continue to be held responsible vis-à-vis creditors. Moreover, the annexing State, being only an assignee in its private capacity, should not be held responsible for personal obligations contracted by its principal . . . (2) The public debt of the dismembered State must be divided between that State and the territory which is annexed; the annexing State should not bear any portion of it . . . (3) The annexing State must take over part of the public debt of the dismembered State. There are two main grounds for this view, which is the most widely held. The public debt was contracted in the interest of the entire territory of the State; the portion which is now detached benefited just as did the rest; it is only fair that it should continue to bear the burden to some extent; but since the annexing State receives the profits from the ceded part, it is only fair that it should bear the costs. The State, whose entire resources are assigned to payment of its debt, must be relieved of a corresponding portion of that debt when it loses a portion of its territory and thus a part of its resources.[350]

(3) The arguments in favour of the passing of part of the general debt can be divided into four groups. The first is the theory of the patrimonial State and of the territory encumbered in its entirety with debts. One author, for example, advocating the passing of a part of the general debt of the predecessor State to the successor State in proportion to the contributing capacity of the transferred territory, argued as follows:

> Whatever territorial changes a State may undergo, State debts continue to be guaranteed by the entire public patrimony of the territory encumbered with the debt. [351] The legal basis for public credit lies precisely in the fact that public debts encumber the territory of the debtor State. . .
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> . . .
>
> Seen from that standpoint, the principle of *indivisibility* [352] proclaimed in the French constitutions of the great Revolution is very enlightening; it has also been proclaimed in a good number of other constitutions.
>
> . . .
>
> . . . These Government actions and their consequences, as well as other events, may adversely affect the finances and the capacity to pay of the debtor State.
>
> All these are risks which must be borne by creditors, who cannot and could not restrict the Government's . . . right freely to dispose of [its] property and of the State's finances . . .
>
> . . .
>
> Nevertheless, creditors do have a legal guarantee in that their claims encumber the territory of the debtor State.
>
> . . .
>
> The debt which encumbers the territory of a State is binding on any Government, old or new, that has jurisdiction over that territory. In case of a territorial change in the State, the debt is binding on all Governments of all parts of that territory . . .
>
> The justification for such a principle is self-evident. When taking possession of assets, one cannot repudiate liabilities: *ubi emolumentum, ibi onus esse debet, res transit cum suo onere*.
>
> Therefore, with regard to State debts, the *emolumentum* consists of the public patrimony within the limits of the encumbered territory.[353]

(4) In the foregoing passage, two arguments are intermingled. The first is debatable, so far as the principle is concerned. Since all parts of the territory of the State "guarantee", as it were, the debt that is contracted, the part which is detached will continue to do so, even if it is placed under another sovereignty; as a result of this, the successor State is responsible for a corresponding part of the general debt of the predecessor State. Such an argument is as valid as the theories of the patrimonial State may be valid. In addition, another argument casts an awkward shadow over the first; it is the reference to the benefit which the transferred territory may have derived from the loan, or to the justification for taking over liabilities because of the acquisition of assets. This argument may fully apply in the case of "local" or "localized" debts, where it is necessary to take into

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[350] Fauchille, *op. cit.*, p. 351.

[351] It is clear from the context that the author meant the entirety of the territory of the predecessor State prior to its amputation.

[352] The author is referring here to the indivisibility of the Republic and of its territory.

[353] Sack, *loc. cit.*, pp. 274-277.

consideration the benefit derived from these debts by the transferred territory or to compare the assets with the liabilities. It has no relevance in the case in point, which involves a general State debt contracted for a nation's general needs, since these needs may be such that the transferred territory will not benefit—or will not benefit as much as other territories—from that general debt.

(5) A second argument is the theory of the profit derived from the loan by the transferred territory. One author, for instance, wrote:

> The State which profits from the annexation must be responsible for the contributory share of the annexed territory in the public debt of the ceding State. It is only fair that the cessionary State should share in the debts from which the territory it is acquiring profited in various ways, directly or indirectly.[354]

Another author wrote that:

> the State which contracts a debt, either through a loan or in any other way, does so for the general good of the nation; all parts of the territory profit as a result.[355]

And he drew the same conclusion. Again, it has been said that:

> these debts were contracted in the general interest and were used to effect improvements from which the annexed areas benefited in the past and will perhaps benefit again in the future . . . It is therefore fair . . . that the State should be reimbursed for the part of the debt relating to the transferred province.[356, 357]

(6) In practice, this theory leads to an impasse; for in fact, since this is a general debt of the State contracted for the general needs of the entire territory, with no precise prior assignment to or location in any particular territory, the statement that such a loan profited a particular transferred territory leads to vagueness and uncertainty. It does not give an automatic and reliable criterion for the assumption by the successor State of a fair and easily-calculated share of the general debt of the predecessor State. In actual fact, this theory is an extension of the principle of succession to local debts, which, not being State debts, are outside the scope of the present draft, and to localized State debts, which will be considered below (paras. (22) *et seq.*). In addition, it may prove unfair in certain cases of territorial transfer, and this would destroy its own basis of equity and justice.

(7) A third argument purports to explain *why* part of the general debt is transferable, but in fact it explains only *how* this operation should be effected. For example, certain theories make the successor State responsible for part of the general debt of the predecessor State by referring flatly to the "contributory capacity" of the transferred territory. Such positions are diametrically opposed to the theory of benefit, so that they and it cancel each other out. The "contributory strength" of a transferred territory, calculated for example by reference to the fiscal resources and economic potential which it previously provided for the predecessor State, is a criterion which is at variance with the theory of the profit derived from the loan by the transferred territory. A territory already richly endowed by nature, which was attached to another State, may not have profited much from the loan but may, on the other hand, have contributed greatly by its fiscal resources to the servicing of the general State debt, within the framework of the former national solidarity. If, when the territory becomes attached to another State, that successor State is asked to assume a share of the predecessor State's national public debt, computed according to the financial resources which the territory provided up to that time, such a request would not be justified by the theory of profit. The criterion of the territory's financial capacity takes no account of the extent to which that territory may have profited from the loan.

(8) A fourth argument is the one based on considerations of justice and equity towards the predecessor State and of security for creditors. It has been argued that the transfer of a territory, particularly of a rich territory, results in a loss of resources for the diminished State. The predecessor State—and indeed the creditors—relied on those resources. It is claimed that it is only fair and equitable, as a consequence, to make the successor State assume part of the general debt of the predecessor State. But the problem is how this share should be computed; some authors refer to "contributory capacity", which is logical, given their premises (referring to the resources previously provided by the territory), while others consider the benefit which the territory has derived from the loan. Thus, the same overlapping considerations, always entangled and interlocked, are found in the works of various authors. It is particularly surprising to find the argument of justice and equity in the works of authors of the nineteenth or early twentieth century, who were living at a time when provinces were annexed by conquest and by war. It is thus difficult to imagine how the annexing State (which did not shrink from the territorial amputation of its adversary or even the forced imposition on the adversary of reparations or a war tribute) could in any way be moved by considerations of justice and equity to assume part of the general debt of the State which it had geographically diminished. There is a certain lack of realism in this theoretical construction.

(9) The arguments which deny that there is any legal basis for the passing of the general State debt from the predecessor to the successor State in the case of transfer of part of the territory have been advanced on two different bases. The first is based on the sovereign nature of the State. The sovereignty which the successor State exercises over the detached territory is not a sovereignty transferred by the predecessor State; the successor State exercises its own sovereignty there. Where State succession is concerned, there is no transfer of sovereignty, but a substitution of one sovereignty for another. In other words, the successor State which is enlarged by a portion of territory exercises its own sovereign rights there and does not come into possession of those of the predecessor State; it therefore does not assume the obligations or part of the debts of the predecessor State.

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[354] H. Bonfils, *Manuel de droit international public (droit des gens)*, 5th ed. (Paris, Rousseau, 1908), p. 117.

[355] N. Politis, *Les emprunts d'Etat en droit international public* (Paris, 1891), p. 111 [thesis].

[356] R. Selosse, *Traité de l'annexion au territoire français et de son démembrement* (Paris, Larose, 1880), p. 168.

[357] For all these and other authors, see the details given by Sack, *loc. cit.*, pp. 295 *et seq.*

(10) The second argument is derived from the nature of the State debt. The authors who deny that a portion of the national public debt (i.e. of a general State debt) passes to the successor State consider that this is a personal debt of the State which contracted it. Thus, in their view, on the occasion of the territorial change this personal debt remains the responsibility of the territorially diminished State, since that State retains its political personality despite the territorial loss suffered. For example, one author wrote:

> . . . The dismembered or annexed State *personally* contracted the debt. (We are considering here only *national* debts, and not local debts . . .); it gave a solemn undertaking to service the debt, *come what might*. It is true that it was counting on the tax revenue to be derived from the *whole* of the territory. In case of *partial* annexation, the dismemberment reduces the resources with which it is expected to be able to pay its debt. *Legally*, however, the obligation of the debtor State cannot be affected by variations in the size of its resources.[338]

And he added a footnote stating:

> *In the case of partial annexation*, most English and American authors consider this principle to be absolute, so that they even declare that the annexing State is not *legally* bound to assume *any* part of the debt of the dismembered State.[339]

For example, one such author wrote:

> The general debt of a State is a personal obligation . . . With the rights which have been contracted by the State as personal rights and obligations, the new State has nothing to do. The old State is not extinct.[340]

(11) The practice of States on the question of the passing of general State debts with a transfer of part of the territory of a predecessor State is equally divided. Several cases can be cited where the successor State assumed such debts.

(12) Under article 1 of the Franco-Sardinian Convention of 23 August 1860, France, which had gained Nice and Savoy from the Kingdom of Sardinia, did assume responsibility for a small part of the Sardinian debt. In 1866, Italy accepted a part of the Pontifical debt proportionate to the population of the Papal States (Romagna, The Marches, Umbria and Benevento) which the Kingdom of Italy had annexed in 1860. In 1881, Greece, having incorporated in its territory Thessaly, which until then had belonged to Turkey, accepted a part of the Ottoman public debt corresponding to the contributory capacity of the population of the annexed province (art. 10 of the Treaty of 24 May 1881).

(13) The many territorial upheavals in Europe following the First World War raised the problem of succession of States to public debts on a large scale, and attempts to settle it were made in the Treaties of Versailles, Saint-Germain-en-Laye and Trianon. In those treaties, writes one author,

> . . . political and economic considerations came . . . into play. The Allied Powers, who drafted the peace treaties practically on their own, had no intention of entirely destroying the economic structure of the vanquished countries and reducing them to a state of complete insolvency. This explains why the vanquished States were not left to shoulder their debts alone, for they would have been incapable of discharging them without the help of the successor States. But other factors were also taken into consideration, including the need to ensure preferential treatment for the allied creditors and the difficulty of arranging regular debt-service owing to the heavy burden of reparations.
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> . . .
>
> Finally, it should be pointed out that the traditional differences in legal theory as to whether or not the transfer of public debts is obligatory caused a cleavage between the States concerned, entailing *a radical opposition between the domestic judicial decisions of the dismembered States and those of the annexing States*.[341]

A general principle of succession to German public debts was accordingly affirmed in article 254 of the Treaty of Versailles of 28 June 1919. According to this provision, the Powers to which German territory was ceded were to undertake to pay a portion—to be determined—of the debt of the German *Empire* and of the debt of the German *State* to which the ceded territory belonged, as they had stood on 1 August 1914.[342] However, article 255 of the Treaty provided a number of exceptions to this principle. For example, in view of Germany's earlier refusal to assume, in consideration of the annexation of Alsace-Lorraine in 1871, part of France's general public debt, the Allied Powers decided, as demanded by France, to exempt France in return from any participation in the German public debt for the retrocession of Alsace-Lorraine.

(14) One author cites a case of participation of the successor State in part of the general debt of its predecessor. However, that case is not consistent with contemporary international law, since the transfer of part of the territory was effected by force. The Third Reich,

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[338] Jèze, "L'emprunt dans les rapports internationaux . . ." (*loc. cit.*), p. 65. However, the same author writes in the same article:

"The annexing State did not *personally* contract the debt of the annexed or dismembered State. It is logical and equitable that, as a result of the annexation, it should *at most* be obligated only *propter rem*, because of the annexation . . . What exactly is involved in the obligation *propter rem*? It is the burden corresponding to the contributory strength of the inhabitants of the annexed territory." (*Ibid.*, p. 62.)

Jèze thus favours in this passage a contribution by the successor State with regard to the general debt of the predecessor State. However, he also states:

". . . *present* and *future* taxpayers in each portion of the territory of the dismembered State must continue to bear the total burden of the debt *regardless of the political events which occur*, even if the annexing State does not agree to assume part of the debt . . . A change in the size of the territory cannot cause the disappearance of the legal obligation regularly contracted by the competent public authorities. The taxpayers of the dismembered State, despite the reduction in its territorial size and in resources, remain bound by the original obligation." (*Ibid.*, p. 70.)

Jèze must ultimately be classified among the authors who favour *conditional* transferability of part of the national public debt of the predecessor State, for he concludes with the following words:

"To sum up, *in principle:* (1) the annexing State must assume part of the debt of the annexed State; (2) this share must be calculated on the basis of the contributory strength of the annexed territory; (3) by way of exception, if it is demonstrated in a *certain and bona fide manner* that the annexed territory's resources for the present and for the near future are not sufficient to service the portion of the debt thus computed and chargeable to the annexing State, the latter State may suspend or reduce the debt to the extent strictly necessary to obtain the desirable financial stability." (*Ibid.*, p. 72.)

[339] *Ibid.*, p. 65, footnote 2.

[340] W. E. Hall, *A Treatise on International Law*, 7th ed. (Oxford, Clarendon Press, 1917), pp. 93 and 95.

[341] Rousseau, *Droit international public* (*op. cit.*), p. 442.

[342] War debts were thus excluded. Art. 254 of the Treaty of Versailles (see footnote 342 above) read as follows:

"The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay:

"(1) A portion of the debt of the German Empire as it stood on August 1, 1914 . . .

"(2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged . . .".

in its agreement of 4 October 1941 with Czechoslovakia, did assume an obligation of 10 billion Czechoslovak korunas as a participation in that country's general debt (and also in the localized debt for the conquered *Länder* of Bohemia-Moravia and Silesia). Part of the 10 billion covered the consolidated internal debt of the State, the State's short-term debt, its floating debt and the debts of government funds, such as the central social security fund, the electricity, water and pension funds (and all the debts of the former Czechoslovak armed forces, as of 15 March 1939, which were State debts and which the said author incorrectly included among the debts of the territories conquered by the Reich).[363]

(15) On the other hand, there have often been cases where the successor State was exonerated from any portion of the general State debt of the predecessor State. Thus, in the "Peace Preliminaries between Austria, Prussia and Denmark", signed at Vienna on 1 August 1864, article 3 provided that:

> Debts contracted specifically on behalf either of the Kingdom of Denmark or of one of the Duchies of Schlesig, Holstein and Lauenburg shall remain the responsibility of each of those countries.[364]

(16) At a time when annexation by conquest was the general practice, Russia rejected any succession to part of the Turkish public debt for territories it had taken from the Ottoman Empire. Its plenipotentiaries drew a distinction between the transfer of part of territory by agreement, donation or exchange (which could perhaps give rise to the assumption of part of the general debt) and territorial transfer effected by conquest—as was acceptable at the time—which in no way created any right to relief from the debt burden of the predecessor State. Thus, at the meeting of the Congress of Berlin on 10 July 1878, the Turkish plenipotentiary, Karatheodori Pasha, proposed the following resolution: "Russia shall assume the part of the Ottoman public debt pertaining to the territories annexed to Russian territory in Asia." It is said in the record of that meeting that:

> Count Shuvalov replied that he believed he was justified in considering it generally recognized that, whereas debts in respect of territories that were detached by agreement, donation or exchange would be apportioned, that was not so in the case of conquest. Russia was the victor in Europe and in Asia. It did not have to pay anything for the territories and could in no way be held jointly responsible for the Turkish debt.
>
> Prince Gorchakov categorically rejected Karatheodori Pasha's request, and said that, in fact, he was astonished by it.
>
> The President said that, in view of the opposition of the Russian plenipotentiaries, he could see no possibility of acceding to the Ottoman proposal.[365]

(17) The Treaty of Frankfurt of 10 May 1871 between France and Prussia, whereby Alsace-Lorraine passed to Germany, was deliberately silent on the assumption by the successor State of part of the French general debt. Bismarck, who in addition had imposed on France, after its defeat at Sedan, the payment of war indemnities amounting to 5 billion francs, had categorically refused to assume a share of the French national public debt proportionate to the size of the territories detached from France.[366] The cession of Alsace-Lorraine to Germany in 1871, free and clear of any contributory share in France's public debt, had, as has been seen (see para. (13) above), a mirror effect in the subsequent retrocession to France of the same provinces, also free and clear of all public debts, under articles 55 and 255 of the Treaty of Versailles.

(18) When, under the Treaty of Ancón of 20 October 1883, Chile annexed the province of Tarapacá from Peru, it refused to assume responsibility for any part whatever of Peru's national public debt. However, after disputes had arisen between the two countries concerning the implementation of the Treaty, another treaty, signed by them at Lima on 3 June 1929, confirmed Chile's exemption from any part of Peru's general debt.[367]

(19) In 1905, no part of Russia's public debt was transferred to Japan with the southern part of the island of Sakhalin.

(20) Following the Second World War, the trend of State practice broke with the solutions adopted at the end of the First World War. Unlike the treaties of 1919, those concluded after 1945 generally excluded the successor States from any responsibility for a portion of the national public debt of the predecessor State. Thus, the Treaty of Peace with Italy of 10 February 1947 ruled out any passing of the debts of the predecessor State, for instance in the case of Trieste, except with regard to the holders of bonds for those debts issued in the ceded territory.[368]

(21) With regard to judicial precedent, the arbitral award most frequently cited is that rendered by E. Borel on 18 April 1925 in the case of the *Ottoman public debt*. Even though this involved a type of succes-

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[363] I. Paenson, *Les conséquences financières de la succession des Etats (1932-1953)* (Paris, Domat-Monchrestien, 1954), pp. 112-113. The author refers to an irregular annexation and, moreover, considers the Czechoslovak case as falling within the category of "cession of part of the territory"; in fact, the case was more complex, involving disintegration of the State, not only through the joining of territories to Hungary and to the Reich, but also through the creation of States: the so-called "Protectorate of Bohemia-Moravia" and Slovakia.

[364] G. F. de Martens, ed., *Nouveau Recueil général de traités* (Gottingen, Dieterich, 1869), vol. XVII, pp. 470 *et seq.*

[365] Protocol No. 17 of the Congress of Berlin for the Settlement of Affairs in the East (*British and Foreign State Papers, 1877-1878* (London, Ridgway, 1885), vol. LXIX, p. 862 and pp. 1052 *et seq.*). This was exactly the policy followed by the other European Powers in the case of conquest.

[366] One must not be led astray by the fact that Bismarck affected to reduce the cost of war indemnities by first fixing them at 6 billion francs, since it did not correspond to an assumption of part of the general debt of France. This apparent concession by Bismarck was later used by von Arnim at the Brussels Conference, on 26 April, 1871, as a pretext for ruling out any participation by Germany in France's general public debt.

[367] However, deposits of guano situated in the province transferred to Chile had apparently served to guarantee Peru's public debt to foreign States such as France, Italy, the United Kingdom or the United States. Claims having been lodged against the successor State for continuance of the security and assumption of part of the general debt of Peru secured by that resource of the transferred territory, a Franco-Chilean arbitral tribunal found that the creditor States had acquired no guarantee, security or mortgage, since their rights resulted from *private* contracts concluded between Peru and certain nationals of those creditor States (arbitral award of Rapperswil, of 5 July 1901). See Feilchenfeld, *op. cit.*, pp. 321-329 and D. P. O'Connell, *The Law of State Succession* (Cambridge, University Press, 1956), pp. 167-170. In any event, the Treaty of Lima referred to above confirmed the exoneration of Chile as the successor State.

[368] Annexes X and XIV of the Treaty (see footnote 342 above).

sion of States other than the transfer of part of the territory of one State to another—since the case related to the apportionment of the Ottoman public debt among States and territories detached from the Ottoman Empire (separation of one or more parts of territory of a State with or without the constitution of new States)—it is relevant here because of the general nature of the terms advisedly used by the arbitrator from Geneva. He took the view that there was no legal obligation for the transfer of part of the general debt of the predecessor State unless a treaty provision existed to that effect. In his award, he said:

> In the view of the arbitrator, despite the existing precedents, one cannot say that the Power to which a territory is ceded is automatically responsible for a corresponding part of the public debt of the State to which the territory formerly belonged.[369]

He stated even more clearly, in the same decision:

> One cannot consider that the principle that a State acquiring part of the territory of another State must at the same time take over a corresponding portion of the latter's public debts is established in positive international law. Such an obligation can derive only from a treaty in which it is assumed by the State in question, and exists only on the terms and to the extent stipulated therein.[370]

(22) Consideration has so far been focused on the general State debts of the predecessor State. What then is the situation as regards localized State debts, i.e. State debts contracted by the central Government on behalf of the entire State but intended particularly to meet the specific needs of a locality, so that the proceeds of the loan may have been used for a project in the transferred territory? At the outset it should be pointed out that, although localized State debts are often dealt with separately from general State debts, identifying such debts can prove to be difficult in practice. As has been stated:

> . . . it is not always possible to establish precisely: (*a*) the intended purpose of each particular loan at the time when it is concluded; (*b*) how it is actually used; (*c*) the place to which the related expenditure should be attributed . . .; (*d*) whether a particular expenditure did in fact benefit the territory in question.[371]

(23) Among the views of publicists, the most commonly—and perhaps most easily—accepted theory appears to be that a special State debt of benefit only to the ceded territory should be attributed to the transferred territory for whose benefit it was contracted. It would then pass with the transferred territory "by virtue of a kind of right of continuance *(droit de suite)*".[372] However, a sufficiently clear distinction is not made between State debts contracted for the special benefit of a portion of territory and local debts proper, which are not contracted by the State. Yet the assertion that they follow the fate of the territory by virtue of a right of continuance, and that they remain charged to the transferred territory, implies that they were already charged to it before the territory was transferred, which is not the case for localized State debts, these being normally charged to the central State budget.

(24) Writers on the subject appear, generally speaking, to agree that the successor State should assume special debts of the predecessor State, as particularized and identified by some project carried out in the transferred territory. The debt will, of course, be attributable to the successor State and not to the transferred territory, which had never assumed it directly under the former legal order and to which there is no reason to attribute it under the new legal order. Moreover, it can be argued that if the transferred territory was previously responsible for the debt it could not be regarded with certainty as a State debt specially contracted by the central Government for the benefit or the needs of the territory concerned. Rather would it be a local debt contracted and assumed by the territorial district itself. That is a completely different case, which does not involve the question of a State debt and hence falls outside the scope of the present draft articles.

(25) The practice of States shows that, in general, the attribution of localized State debts to the successor State has nearly always been accepted. Thus, in 1735, the Emperor Charles VI borrowed the sum of one million crowns from some London financiers and merchants, securing the loan with the revenue of the Duchy of Silesia. Upon his death in 1740, Maria Theresa ceded the territory to Frederick II of Prussia, under the Treaties of Breslau and Berlin. Under the latter treaty, signed on 28 July 1742, Frederick II undertook to assume the sovereign debt (or State debt, as it would be called today) with which the province was encumbered as a result of the security arrangement.

(26) Two articles of the Treaty of Peace between Austria and France, signed at Campo Formio on 17 October 1797, presumably settled the question of the State debts contracted in the interests of the Belgian provinces or secured on them at the time when Austria ceded those territories to France:

> Article IV. All debts which were secured, prior to the war, on the territory of the countries specified in the preceding articles, and which were contracted in accordance with the customary formalities, shall be assumed by the French Republic.
>
> Article X. Debts secured on the territory of countries ceded, acquired or exchanged under this Treaty shall pass to the parties into whose possession the said countries come.[373]

These two articles, like similar articles in other treaties, referred without further specification to "debts secured on the territory" of a province. This security arrangement may have been made either by the central authority in respect of State debts or by the provincial authority in respect of local debts. However, the context suggests that it was in fact a question of State debts, since the debts were challenged for the very reason that the provinces in question had not consented to them. France refused on that ground to assume the so-called "Austro-Belgian" State debt dating from the period of Austrian rule.[374]

(27) As a result of this, France, Germany and Austria included in the Treaty of Lunéville of 9 February 1801 an article VIII reading as follows:

> As in articles IV and X of the Treaty of Campo Formio, it is agreed that, in all countries ceded, acquired or exchanged under this

[369] United Nations, *Reports of International Arbitral Awards*, vol. I *(op. cit.)*, p. 573.
[370] *Ibid.*, p. 571.
[371] Sack, *loc. cit.*, p. 292.
[372] F. Despagnet, *Cours de droit international public*, 3rd ed. (Paris, Larose et Tenin, 1905), p. 109.
[373] G. F. de Martens, ed., *Recueil des Principaux Traités* (Gottingen, Dieterich, 1829), vol. VI, pp. 422-423.
[374] Sack, *loc. cit.*, pp. 268-269.

Treaty, those into whose possession they come shall assume debts secured on the territory of the said countries; in view, however, of the difficulties which have arisen in this connection with regard to the interpretation of the said articles of the Treaty of Campo Formio, it is expressly agreed that the French Republic shall assume only debts resulting from loans formally authorized by the States of the ceded countries or from expenditure undertaken for the actual administration of the said countries.[375] [The word "States" here refers not to a State entity, but to provincial bodies.]

(28) The Treaty of Peace between France and Prussia signed at Tilsit on 9 July 1807 made the successor State liable for debts contracted by the former sovereign for or in the ceded territories. Article 24 of the Treaty reads as follows:

Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Prussia may have entered into or contracted . . . as owner of countries, territories, domains, property and revenue ceded or renounced by His Majesty under this Treaty shall be assumed by the new owners . . . .[376]

(29) Article IX of the Treaty of Peace of Pressburg of 26 December 1805 between Austria and France provided that His Majesty the Emperor of Germany and Austria:

shall remain free of any obligation in relation to any debts whatsoever which the House of Austria has contracted by reason of possession, and has secured on the territory of the countries which it renounces under this Treaty.[377]

Similarly, article VIII of the Treaty signed at Fontainebleau on 11 November 1807 between France and Holland provided that:

Such undertakings, debts and obligations of whatsoever nature as His Majesty the King of Holland may have entered into or contracted as owner of the ceded cities and territories shall be assumed by France . . .[378]

Article XIV of the Convention of 28 April 1811 between Prussia and Westphalia is worded like the article just cited.[379]

(30) Article VIII of the Treaty of Lunéville of 9 February 1801 served as a model for article V of the Treaty of Paris between France and Wurtemburg of 20 May 1807, which stated:

Article VIII of the treaty of Lunéville, concerning debts secured on the territory of the countries on the left bank of the Rhine, shall serve as a basis and rule in respect of the debts with which the possessions and countries included in the cession under article II of the present Treaty are encumbered.[380]

The Convention of 14 November 1802 between the Batavian Republic and Prussia contains a similarly worded article IV.[381] Again, article XI of the Territorial Convention concluded on 22 September 1815 between Prussia and Saxe-Weimar provided that "His Royal Highness shall assume [any debts] . . . specially secured on the ceded districts".[382]

(31) Article 4 of the Treaty of 4 June 1815 between Denmark and Prussia provided as follows:

H.M. the King of Denmark undertakes to assume the obligations which H.M. the King of Prussia has contracted in respect of the Duchy of Lauenburg under articles IV, V and IX of the Treaty of 29 May 1815 between Prussia and His Britannic Majesty, King of Hanover . . . .[383]

The Convention between France and the Allied Powers of 20 November 1815, whose 26 articles dealt exclusively with debt questions, required the successor State to assume debts which formed part of the French public debt (State debts), but originated as "debts specially secured . . . by mortgages upon countries which have ceased to form part of France or, otherwise contracted by their internal administration, . . ." (art. VI).[384]

(32) Even though an irregular forced annexation of territory was involved, mention may be made of the assumption by the Third Reich, under the Agreement of 4 October 1941, of debts contracted by Czechoslovakia for the purpose of private railways in the *Länder* seized from it by the Reich.[385] Debts of this kind seem to be governmental in origin and local in purpose.

(33) After the Second World War, France, which had regained Tenda and Briga from Italy, agreed to assume part of the Italian debt only subject to the following four conditions: (*a*) that the debt was attributable to public works or civilian administrative services in the transferred territories; (*b*) that the debt was contracted before Italy's entry into the war and was not intended for military purposes; (*c*) that the transferred territories had benefited from the debt; and (*d*) that the creditors resided in the transferred territories.

(34) Succession to special State debts which were used to meet the needs of a particular territory is more likely if the debts in question are backed by a special security arrangement. The predecessor State may have secured its special debt on tax revenue derived from the territory which it is losing or on property situated in the territory in question, such as forests, mines or railways.

[375] French text in C. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana [1969]), vol. 55, p. 480, and G. F. de Martens, ed., *Recueil des Principaux Traités* (*op. cit.*, 1831), vol. VII, p. 299.

[376] French text in Parry, *op. cit.*, vol. 59, p. 261, and Martens, *Recueil des Principaux Traités* (*op. cit.*, 1835), vol. VIII, p. 666.

[377] French text in Parry, *op. cit.*, vol. 58, p. 344, and Martens, *Recueil des Principaux Traités* (*op. cit.*), vol. VIII, p. 391.

[378] French text in Parry, *op. cit.*, vol. 59, p. 393, and Martens, *Recueil des Principaux Traités* (*op. cit.*), vol. VIII, p. 720.

[379] French text in Parry, *op. cit.*, vol. 61, p. 295, and G. F. de Martens, ed., *Nouveau Recueil des Traités* (Gottingen, Dieterich, 1817), vol. I, p. 367.

[380] Martens, *Recueil des Principaux Traités* (*op. cit.*), vol. VII, p. 430.

[381] *Ibid.*, pp. 427-428, and Parry, *op. cit.*, vol. 56, p. 426.

[382] German text in Parry, *op. cit.*, vol. 65, pp. 190-191, and *British and Foreign State Papers, 1814-1815* (London, Ridgway, 1839), vol. II, p. 950.

[383] French text in Parry, *op. cit.*, vol. 64, p. 422, and *British and Foreign State Papers, 1814-1815* (*op. cit.*), p. 182.

[384] French text and English trans. in *British and Foreign State Papers, 1815-1816* (London, Ridgway, 1838), vol. III, p. 326. See also art. 5 of the Treaty of Peace of 14 October 1809 between Austria and France, concerning debts secured on the territories ceded to France by Austria (Upper Austria, Carniol, Carinthia, Istria) (Parry, *op. cit.*, vol. 60, p. 481, and *British and Foreign State Papers, 1814-1815* (*op. cit.*), pp. 12, 41); art. VII of the Treaty of 3 June 1814 between Austria and Bavaria (French text in Parry, *op. cit.*, vol. 63, p. 215, and *British and Foreign State Papers, 1812-1814* (London, Ridgway, 1841), vol. I, Part I, p. 179); art. IX of the Treaty of 18 May 1815 between Prussia and Saxony (French text in Parry, *op. cit.*, vol. 64, pp. 184-185, and *British and Foreign State Papers, 1814-1815* (*op. cit.*), pp. 87-88); art. XIX of the Treaty of Cession between Sardinia and Switzerland of 16 March 1816, under which the Kingdom of Sardinia ceded to Switzerland various territories in Savoy, which were incorporated into the Canton of Geneva (French text in Parry, *op. cit.*, vol. 65, pp. 454-455, and *British and Foreign State Papers, 1819-1820* (London, Ridgway, 1834), vol. VII, p. 28).

[385] Paenson, *op. cit.*, p. 113.

In both cases, succession to such debts is usually accepted.

(35) On rare occasions, however, the passing of localized debts has been refused. One such example is article 255 of the Treaty of Versailles, which provided a number of exceptions to the general principle, laid down in article 254, of the passing of public debts of the predecessor State (see para. (13) above). Thus, in the case of all ceded territories other than Alsace-Lorraine, that portion of the debt of the German Empire or the German States which represented expenditure by them on property and possessions belonging to them and situated in the ceded territories was not assumed by the successor States. Obviously, political considerations played a role in this particular case.

(36) From the foregoing observations it may be concluded that, while there appears to exist a fairly well-established practice requiring the successor State to assume a localized State debt, no such consensus can be found with regard to general State debts. Although the refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice, political considerations or considerations of expediency have admittedly played some part in such refusals. At the same time, those considerations appear to have weighed even more heavily in cases where the successor State ultimately assumed a portion of the general debt of the predecessor State, as occurred in the peace treaties ending the First World War. In any event, it must also be acknowledged that the bulk of the treaty precedents available consists largely of treaties terminating a state of war; and there is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity, or even of law.

(37) Whatever the case, the refusal of the successor State to assume part of the national public debt of the predecessor State appears to have logic on its side, as one author remarks, although he agrees that this approach is hard for the ceding State, which is deprived of part of its property without being relieved of its debt, whereas the cessionary State is enriched or enlarged without a corresponding increase in its debt burden.[386] It is useless, however, to seek for the existence of an incontestable rule of international law to avoid this situation. Under the circumstances, the Commission proposes, in the absence of an agreement between the parties concerned, the introduction of the concept of equity as the key to the solution of problems relating to the passing of State debts. That concept has already been adopted by the Commission in parts II and III of the draft and therefore does not require detailed commentary here.[387]

(38) The rules enunciated in article 35 keep certain parallelisms with those of articles 13 and 25, relating to the passing of State property and of State archives respectively. *Paragraph 1* thus provides for, and thereby attempts to encourage, settlement by agreement between the predecessor and successor States. Although it reads "the passing . . . is to be settled . . .", the paragraphs should not be interpreted as presuming that there is always such a passing. *Paragraph 2* provides for the situation where no such agreement can be reached. It stipulates that "an equitable proportion" of the State debt of the predecessor State shall pass to the successor State. In order to determine what constitutes "an equitable proportion", all the relevant factors should be taken into account in each particular case. Such factors must include, among others, "the property, rights and interests" which pass to the successor State in relation to the State debt in question.

(39) Article 35 is drafted in such a way as to cover all types of State debts, whether general or localized. It may readily be seen that under *paragraph 2* localized State debts would pass to the successor State in an equitable proportion, taking into account, *inter alia*, the "property, rights and interests" which pass to the successor State in relation to such localized State debts.

Article 36. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

Commentary

(1) Article 36 concerns succession of States in respect of State debts when the successor State is a newly independent State. This is an article parallel to article 14, relating to succession of States in respect of State property in the case of a newly independent State and to article 26 concerning succession to State archives in the same case.

(2) The Commission has on several occasions affirmed the necessity and utility of including "newly independent State" as a distinct type of succession of States. It did so in its draft articles on succession of States in respect of treaties[388] and again in the present set of draft articles in connection with succession in respect of State property and State archives. It might be argued by some that decolonization is a thing of the past, belonging almost entirely to the history of international relations, and that consequently there is no need to include "newly independent State" in a typology of succession of States. In fact, decolonization is not yet fully completed. Important parts of the world are still dependent, even though some cover only a small area. And decolonization is far from complete

[386] L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris, Pedone, 1967), vol. I, p. 380.

[387] See paras. 76-85 above.

[388] See *Yearbook . . . 1974*, vol. II (Part One), pp. 167 and 168-169, document A/9610/Rev.1, paras. 45 and 57-60.

from yet another point of view. If decolonization is taken to mean the end of a relationship based on political domination, it has reached a very advanced stage; but economic relations are vital, and are much less easily rid of the effects of colonization than political relations. Political independence may not be genuine independence, and, in reality, the economy of newly independent States may long remain particularly dependent on the former metropolitan country and firmly bound to it, even allowing for the fact that the economies of nearly all countries are interdependent. Hence it cannot be denied that draft articles on succession of States in respect of State debts may be useful, not only with respect to territories which are still dependent but also with respect to countries which have recently attained political independence, and even to countries which attained political independence much earlier. In fact, the debt problem, including the servicing of the debt, the progressive amortization of the principal and the payment of interest, all spread over several years, if not decades, is the most typical example of matters covered by succession which long survive political independence. Thus, the effects of problems connected with succession of States in respect of State debts continue to be felt for many decades and would appear more lasting than the effects of succession in respect of treaties, State property or State archives, in each of which cases the Commission nevertheless devoted one or more articles to decolonization.

(3) Before reviewing State practice and the views of jurists on the fate of State debts in the process of decolonization, it may be of historical interest to note the extent to which colonial Powers were willing, in cases of *colonization* which occurred during the last century and the early 1900s, to assume the debts of the territories colonized. State practice seems contradictory in this respect. In the cases of the annexation of Tahiti in 1880 (by internal law), Hawaii in 1898 (by internal law), and Korea in 1910 (by treaty), the States which annexed those territories assumed wholly or in part the debts of the territory concerned.[389] In an opinion relating to the Joint Resolution of the United States Congress providing for the annexation of Hawaii, the United States Attorney-General stated that:

> the general doctrine of international law, founded upon obvious principles of justice, is that, in the case of annexation of a State or cession of territory, the substituted sovereignty assumes the debts and obligations of the absorbed State or territory—it takes the burdens with the benefits.[390]

In the case of the annexation of the Fiji Islands in 1874, it appears that the United Kingdom, after annexation, agreed voluntarily to undertake payment of certain debts contracted by the territory before annexation, as an "act of grace".[391] The metropolitan Power did not recognize a legal duty to discharge the debts concerned. A similar position appears to have been taken on the annexation of Burma by the United Kingdom in 1886.[392]

(4) In other cases, the colonial Powers refused to honour the debts of the territory concerned. In the 1895 treaty establishing the (second) French protectorate over Madagascar, article 6 stated that, *inter alia*,

> The Government of the French Republic assumes no responsibility with respect to undertakings, debts or concessions contracted by the Government of Her Majesty the Queen of Madagascar before the signing of the present Treaty.[393]

Shortly after the signing of that treaty, the French Minister for Foreign Affairs declared in the Chamber of Deputies that, as regards the debts contracted abroad by the Madagascar Government,

> the French Government will, without having to guarantee them for our own account, follow strictly the rules of international law governing cases in which sovereignty over a territory is transferred as a result of military action.[394]

According to one writer, while that declaration recognized the existence of rules of international law governing the treatment of debts of States that had lost their sovereignty, it also made clear that, according to the opinion of the French Government, there was no rule of international law which compelled an annexing State to guarantee or assume the debts of annexed States.[395] The Annexation Act of 1896 by which Madagascar was declared a French colony was silent on the issue of succession to Malagasy debts. Colonial Powers also refused to honour debts of colonized territories on the grounds that the previously independent State retained a measure of legal personality. Such appears to have been the case with the protectorates established at the end of the nineteenth century in Tunisia, Annam, Tonkin and Cambodia.[396] A further example may be mentioned, that of the annexation of the Congo by Belgium.[397] In the 1907 treaty of cession, article 3 provided for the succession of Belgium in respect of all the liabilities and all the financial obligations of the "Congo Free State", as set forth in annex C. However, in article 1 of the Colonial Charter of 1908 it was stated that the Belgian Congo was an entity distinct from the metropolitan country, having separate laws, assets and liabilities, and that, consequently, the servicing of the Congolese debt was to remain the exclusive responsibility of the colony, unless otherwise provided by law.

Early decolonization

(5) In the case of the independence of thirteen British colonies in North America, the successor State, the United States of America, did not succeed to any of the debts of the British Government. Neither the Treaty of Versailles of 1783, by which Great Britain recognized the independence of those colonies, nor the constituent instruments of the United States (the Articles of Confederation of 1776 and 1777 and the Constitution of 1787) mention any payment of debts owed by the former metropolitan Power.[398] This precedent was alluded to in the 1898 peace negotiations between Spain and the United States following the Spanish-American War. The Spanish delegation asserted that there were publi-

[389] Feilchenfeld, *op. cit.*, pp. 369, 377 and 378, respectively.
[390] O'Connell, *State Succession . . . (op. cit.)*, p. 377.
[391] Feilchenfeld, *op. cit.*, p. 292.
[392] *Ibid.*, p. 379. It appears that the British Government did not consider Upper Burma to be a "civilized country" and that, therefore, rules more favourable to the "succeeding Government" could be applied than in the case of the incorporation of a "civilized" State (O'Connell, *State Succession . . . (op. cit.)*,

[393] See Feilchenfeld, *op. cit.*, p. 372, footnote 20.
[394] *Ibid.*, p. 373, footnote 22.
[395] *Ibid.*, p. 373.
[396] *Ibid.*, pp. 369-371.
[397] *Ibid.*, pp. 375-376.

cists who maintained that the thirteen colonies which had become independent had paid 15 million pounds to Great Britain for the extinguishment of colonial debts. The American delegation, however, viewed the assertion as entirely erroneous, pointing out that the preliminary (1782) and definitive (1783) treaties of peace between the United States and Great Britain contained no stipulation of the kind referred to.[399]

(6) A similar resolution of the fate of the State debts of the predecessor State occurred in South America upon the independence of Brazil from Portugal in the 1820s. During the negotiations in London in 1822, the Portuguese Government claimed that part of its national debt should be assumed by the new State. In a dispatch of 2 August 1824, the Brazilian plenipotentiaries informed their Government of the way in which they had opposed that claim, which they deemed inconsistent with the examples furnished by diplomatic history. The dispatch states:

> Neither Holland nor Portugal itself, when they separated from the Spanish Crown, paid anything to the Court of Madrid in exchange for the recognition of their independence; recently the United States likewise paid no monetary compensation to Great Britain for similar recognition.[400]

The treaty of Peace between Brazil and Portugal of 29 August 1825 which resulted from the negotiations in fact made no express reference to the transfer of part of the Portuguese State debt to Brazil. However, since there were reciprocal claims involving the two States, a separate instrument—an additional agreement of the same date—made Brazil responsible for the payment of 2 million pounds sterling as part of an arrangement designed to liquidate those reciprocal claims.

(7) With regard to the independence of the Spanish colonies in America,[401] article VII of the Treaty of Peace and Friendship signed at Madrid on 28 December 1836 between Spain and newly independent Mexico reads as follows:

> Considering that the Mexican Republic, by a Law passed on the 28th of June, 1824, in its General Congress, has voluntarily and spontaneously recognized as its own and as national, all debt contracted *upon its Treasury** by the Spanish Government of the Mother Country and *by its authorities, during the time they ruled the now independent Mexican Nation**, until, in 1821, they entirely ceased to govern it . . . Her Catholic Majesty . . . and the Mexican Republic, by common accord, desist from all claim or pretension which might arise upon these points, and declare that the 2 High Contracting Parties remain free and quit from henceforward for ever from all responsibility on this head.[402]

It thus seems clear that, in accordance with its unilateral statement, independent Mexico had taken over only those debts of the Spanish State that had been contracted for and on behalf of Mexico and had already been charged to the Mexican Treasury.

(8) Article V of the Treaty of Peace and Friendship and Recognition signed at Madrid on 16 February 1840 between Ecuador and Spain in turn provided that:

> The Republic of Ecuador . . . renounces voluntarily and spontaneously *every debt contracted upon the credit of her treasuries, whether by the direct orders of the Spanish Government or by its authorities established in the territory** of Ecuador, provided that such debts are always registered in the account-books belonging to the treasuries of the ancient kingdom and presidency of Quito, or that it is shown through some other legal and equivalent means that they have been contracted within the said territory by the aforementioned Spanish Government and its authorities whilst they administered the now independent Ecuadorian Republic, until they entirely ceased governing it in the year 1822.[403]

(9) A provision more or less similar to the one in the treaties mentioned above may be found in article V of the Treaty of Peace of 30 March 1845 between Spain and Venezuela, in which Venezuela recognized:

> as a national debt . . . the sum to which the debt owing by the treasury of the Spanish Government amounts, and which will be found entered in the ledgers and account books . . . of the former Captaincy-General of Venezuela, or which may arise from any other and legitimate claims . . .[404]

Similar wording may be found in a number of treaties concluded between Spain and the former colonies.[405]

(10) The cases of decolonization of the former Spanish dependencies in America would seem to represent a departure from the earlier precedents set by the United States and Brazil. However, it may be noted that the departure was a limited one, not involving a succession to the *national* debt of the predecessor State, but rather to two types of debts: those contracted by the predecessor State for and on behalf of the dependent territory, and those contracted by an organ of the colony. As has been noted,[406] the latter category of debts, considered as

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[399] *Ibid.*, p. 54, footnote 95.

[400] Dispatch of 2 August 1824, in *Archivo Diplomático da Independencia*, vol. II, p. 95, cited by H. P. Accioly, *Tratado de Derecho Internacional Público* (Rio de Janeiro, Imprensa Nacional, 1945), vol. I, pp. 199-200 (French trans. *Traité de droit international public*, trans. P. Goulé (Paris, Sirey, 1940), vol. I, pp. 198-199). It would appear that the matter at issue was less a question of Brazil's taking over part of the Portuguese State public debt than of the payment of "compensation" in exchange for the "recognition of independence".

[401] See J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. I, pp. 342-343. See also Feilchenfeld, *op. cit.*, pp. 251-257, and Jèze, "L'emprunt dans les rapports internationaux . . ." (*loc. cit.*), p. 76. The case of Cuba is dealt with in para. (12) of this commentary.

[402] Spanish text and English trans. in *British and Foreign State Papers, 1835-1836* (London, Ridgway, 1853), vol. XXIV, pp. 868-869.

[403] Spanish text in Parry, *op. cit.*, vol. 89, p. 491; English trans. *ibid.*, pp. 496-497, and *British and Foreign State Papers, 1840-1841* (London, Ridgway, 1857), vol. XXIX, p. 1315.

[404] Spanish text in Parry, *op. cit.*, vol. 98, p. 111; English trans. *ibid.*, p. 116, and *British and Foreign State Papers, 1846-1847* (London, Harrison, 1860), vol. XXXV, p. 302.

[405] For example, art. IV of the Treaty of Peace between the Argentine Republic and Spain of 9 July 1859 (Spanish text in Parry, *op. cit.*, vol. 120, p. 481; English trans. *ibid.*, p. 486, and *British and Foreign State Papers, 1859-1860* (London, Ridgway, 1867), vol. L, p. 1161); art. XI of the Treaty of Peace between Spain and Uruguay of 9 October 1841 (English trans. in Parry, *op. cit.*, vol. 92, p. 117, and *British and Foreign State Papers, 1841-1842* (London, Ridgway, 1858), vol. XXX, p. 1369); art. V of the Treaty of Peace between Spain and Costa Rica of 10 May 1850 (Spanish text in Parry, *op. cit.*, vol. 104, pp. 91-92; English trans. *ibid.*, pp. 97-98, and *British and Foreign State Papers, 1849-1850* (London, Harrison, 1863), vol. XXXIX, p. 1341); art. V of the Treaty of Recognition, Peace and Friendship between Nicaragua and Spain of 25 July 1850 (Spanish text in Parry, *op. cit.*, vol. 104, pp. 217-218; English trans. *ibid.*, p. 224, and *British and Foreign State Papers, 1849-1850 (op. cit.)*, p. 1331); art. IV of the Treaty of Recognition between Spain and Guatemala of 29 May 1863 (Spanish text in Parry, *op. cit.*, vol. 127, p. 481; English trans. in *British and Foreign State Papers, 1868-1869* (London, Ridgway, 1874), vol. LIX, p. 1200); art. IV of the Treaty of Peace between Spain and El Salvador of 24 June 1865 (Spanish text in Parry, *op. cit.*, vol. 131, p. 255; English trans. *ibid.*, pp. 260-261, and *British and Foreign State Papers, 1867-1868* (London, Ridgway, 1873), vol. LVIII, pp. 1251-1252).

[406] See above, paras. (14) *et seq.* of the commentary to art. 31.

proper to the territory itself, are in any event excluded from the subject-matter of the present draft articles as they do not properly fall within the scope and definition of State debts of the *predecessor State*. In spite of the fact that overseas possessions were considered, under the colonial law of the time, to be a territorial extension of the metropolitan country, with which they formed a single territory, it did not occur to writers that any part of the national public debt of the metropolitan country should be imposed on those possessions.[407] That was a natural solution, according to one author, because "the creditors [of the metropolitan country] could never reasonably assume that their debts would be paid out of the resources to be derived from such a financially autonomous territory".[408] What was involved was not a participation of the former Spanish American colonies in the *national* debt of the metropolitan territory of Spain, but a take-over by those colonies of State debts, admittedly of Spain, but contracted by the metropolitan country on behalf and for the benefit of its overseas possessions.[409] It must also be pointed out that in the case of certain treaties there was a desire to achieve a "package deal" involving various reciprocal compensations rather than any real participation in the debts contracted by the predecessor State for and on behalf of the colony. Finally, it may be noted that, in most of the cases involving Spain and her former colonies, the debts assumed by the successor States were assumed by means of internal legislation, even before the conclusion of treaties with Spain, which often merely took note of the provisions of those internal laws. None of the treaties, however, speak of rules or principles of international law governing succession to State debts. Indeed, many of the treaty provisions indicate that what was involved was a "voluntary and spontaneous" decision on the part of the newly independent State.

(11) Mention should, however, be made of one Latin American case which appears to be at variance with the general practice of decolonization in that region as outlined in the preceding paragraph. This relates to the independence of Bolivia. A treaty of Recognition, Peace and Friendship, signed between Spain and Bolivia on 21 July 1847, provides in article V that:

> The Republic of Bolivia . . . has already spontaneously recognized, by the law of 11 November 1844, *the debt contracted against its treasury, either by the direct orders of the Spanish Government*,* or by orders emanating from the established authorities of the latter in the territory of Upper Peru, now the Republic of Bolivia; and [recognizes] as consolidated debt of the Republic, in the same category as the most highly privileged debt, *all the credits, of whatever description, for pensions, salaries, supplies, advances, freights, forced loans, deposits, contracts and every other debt, either arising from the war or prior thereto*,* which are a charge upon the aforesaid treasury, provided always that such credits proceed *from the direct orders of the Spanish Government** or of their established authorities in the provinces which now form the Republic of Bolivia . . . .[410]

(12) The Anglo-American precedent of 1783 and the Portuguese-Brazilian precedent of 1825 were followed by the Peace Treaty of Paris of 10 December 1898, concluded at the end of the war between the United States and Spain. The charging of Spanish State debts to the budget of Cuba by Spain was contested. The assumption that charging a debt to the accounts of the Cuban Treasury meant that it was a debt contracted on behalf and for the benefit of the island was successfully challenged by the United States plenipotentiaries. The Treaty of 1898 freed Spain only from liability for debts proper to Cuba, that is, debts contracted after 24 February 1895 and the mortgage debts of the municipality of Havana. It did not allow succession to any portion of the Spanish State debt which Spain had charged to Cuba.[411]

Decolonization since the Second World War

(13) An examination of cases of decolonization since the Second World War indicates little conformity in the practice of newly independent States. There are precedents in favour of the passing of State debts and precedents against, as well as cases of repudiation of such debts after they had been accepted. It is not the intention of the Commission to overburden this commentary by including a complete catalogue of all cases of decolonization since the Second World War. The cases mentioned below are not intended to represent an exhaustive survey of practice in the field, but are rather provided as illustrative examples.

(14) The independence of the Philippines was authorized by the Philippines Independence Act (otherwise known as the "Tydings-McDuffie Act") of the United States Congress, approved on 24 March 1934.[412] By that Act, a distinction was made between the bonds issued before 1934 by the Philippines with the authorization of the United States Congress and other public debts. It provided that the United States declined all responsibility for those post-1934 debts of the archipelago. The inference has accordingly been drawn that the United States intended to maintain pre-1934 congressionally authorized debts.[413] As regards these pre-1934 debts, by a law of 7 August 1939, the proceeds of Philippine export taxes were allocated to the United States Treasury for the establishment of a special fund for the amortization of the pre-1934 debts contracted by the Philippines with United States authorization.

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[407] Cases of unlimited colonial exploitation whereby a metropolitan Power, during the time of the old colonial empires, was able to cover part of its national debt by appropriating all of the resources or raw materials of the colonies, have been disregarded as being archaic or rare. See footnote 453 below.

[408] Jèze, "L'emprunt dans les rapports internationaux . . ." *(loc. cit.)*, p. 74.

[409] It seems clear, however, that the South American republics which attained independence did not seek to determine whether the metropolitan country had been fully justified in including the debt among the liabilities of their respective treasuries. The inclusion of that debt in the accounts of the treasury of the colony by the metropolitan country was based on an assumption that the debt had been concluded on behalf and for the benefit of the colony. Such an assumption was vigorously challenged in later cases of succession. See para. (12) of this commentary.

[410] English trans. in *British and Foreign State Papers, 1868-1869 (op. cit.)*, vol. LIX, p. 423.

[411] Feilchenfeld, *op. cit.*, pp. 329-343; Moore, *op. cit.*, pp. 351 *et seq.*, and Jèze, "L'emprunt dans les rapports internationaux" . . . *(loc. cit.)*, p. 84.

[412] O'Connell, *State Succession . . . (op. cit.)*, p. 433; G. Fischer, *Un cas de décolonisation—Les Etats-Unis et les Philippines* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 264; and M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1963), vol. 2, p. 211-213, 854.

[413] Fischer, *op. cit.*, p. 264.

Under the 1934 and 1939 Acts, it was provided that the archipelago could not repudiate loans authorized by the predecessor State and that if, on the date of independence, the special fund should be insufficient for service of that authorized debt, the Philippines would make a payment to balance the account. Under both its Constitution (art. 17) and the Treaty of 4 July 1946 with the United States, the Philippines assumed all the debts and liabilities of the islands.

(15) The case of the independence of India and Pakistan is another example where the successor State accepted the debts of the predecessor State. It would be more correct to speak of successor *States*, and in fact this seems a two-stage succession as a result of partition, Pakistan succeeding to India, which succeeded to the United Kingdom. It has been explained that:

> There was no direct repartition of the debts between the two Dominions. All financial obligations, including loans and guarantees, of the central Government of British India remained the responsibility of India . . . While India continued to be the sole debtor of the central debt, Pakistan's share of this debt, proportionate to the assets it received, became a debt to India.[414]

It does not seem that many distinctions were made regarding the different categories of debt. Only one appears to have been made by the Committee of Experts set up to recommend the apportionment of assets and liabilities. This was the public debt, composed of permanent loans, treasury bills and special loans, as against the unfunded debt, which comprised savings bank deposits and bank deposits. These various obligations were assigned to India, but it is not indicated whether they were debts proper to the dependent territory, which would have devolved upon it in any event, or debts of the predecessor State, which would thus have been transferred to the successor State. The problem to which the Committee of Experts appears to have devoted most attention was that of establishing the modalities for apportioning the debt between India and Pakistan. An agreement of 1 December 1947 between the two States was to embody the practical consequences of this and determine the respective contributions. That division, however, has not been implemented, owing to differences between the two States as to the sums involved.

(16) The problems arising from the succession of Indonesia to the Kingdom of the Netherlands were, as far as debts are concerned, reflected essentially in two instruments: the Round-Table Conference Agreement, signed at The Hague on 2 November 1949,[415] and the Indonesian Decree of 15 February 1956, which repudiated the debt, Indonesia having denounced the 1949 agreements on 13 February 1956.[416] The Financial and Economic Agreement (which is only one of the Conference agreements) specifies the debts which Indonesia agreed to assume.[417] Article 25 distinguishes four series of debts: (*a*) a series of six consolidated loans; (*b*) debts to third countries; (*c*) debts to the Kingdom of the Netherlands; (*d*) Indonesia's internal debts.

(17) The last two categories of debts need not be taken into consideration here. Indonesia's debts to the Kingdom of the Netherlands were in fact debt-claims of the predecessor State, and thus do not come within the scope of the present commentary. The internal debt of Indonesia at the date of the transfer of sovereignty is also excluded by definition. However, it should be noted that this category was not precisely defined. The predecessor State later interpreted that provision as including debts which the successor State considered as "war debts" or "odious debts". It would appear that this was a factor in the denunciation and repudiation of the debt in 1956.[418]

(18) The other two categories of debts to which the newly independent State succeeded involved: (*a*) consolidated debts of the Government of the Netherlands Indies[419] and the portion attributed to it in the consolidated national debt of the Netherlands consisting of a series of loans issued before the Second World War; (*b*) certain specific debts to third States.[420]

(19) During the Round-Table Conference, Indonesia brought up issues relating to the degree of autonomy which its organs had possessed by comparison with those of the metropolitan country at the time when the loans were contracted. The Indonesian plenipotentiaries also, and in particular, referred to the problem of their assignment, and the utilization of and benefit derived from those loans by the territory. As in the other cases, it appears that the results of the negotiations at the Hague should be viewed as a whole and in the context of an overall arrangement. The negotiations had led to the creation of a "Netherlands-Indonesian Union", which was dissolved in 1954. Shortly afterwards, in 1956, Indonesia repudiated all of its colonial debts.

(20) On the accession of Libya to independence, the General Assembly of the United Nations resolved the problem of the succession of States, including the successions to debts, in resolution 388 (V) of 15 December 1950 entitled "Economic and financial provisions relating to Libya", article IV of which stated that "Libya shall be exempt from the payment of any portion of the Italian public debt".

(21) Guinea attained its independence in 1958, following its negative vote in the constitutional referendum of 28 September of the same year establishing the Fifth Republic of the French Community. One writer stated: "Rarely in the history of international relations has a succession of States begun so abruptly".[421] The

[414] O'Connell, *State Succession . . . (op. cit.)*, p. 404.

[415] United Nations, *Treaty Series*, vol. 69, p. 3. See also O'Connell, *State Succession . . . (op. cit.)*, pp. 437-438, and Paenson, *op. cit.*, pp. 77-78.

[416] Rousseau, *Droit international public (op. cit.)*, pp. 451-452.

[417] United Nations, *Treaty Series*, vol. 69, pp. 252-258, draft Financial and Economic Agreement, arts. 25-27.

[418] See "L'Indonésie répudie sa dette envers les Pays-Bas", in *La Libre Belgique* of 12 August 1956, quoted in: France, *Problèmes économiques* (Paris), La documentation française, No. 452 (28 August 1956), pp. 17-18.

[419] It has been maintained that these debts were contracted by the dependent territory on its own behalf and for its own account (Rousseau, *Droit international public (op. cit.)*, p. 451; O'Connell, *State Succession . . . (op. cit.)* p. 437). It appears, however, that the loans were contracted under Netherlands legislation; thus the argument could be made that the debts were contracted by the metropolitan Power for the account of the dependent territory.

[420] This involved debts contracted under the Marshall Plan and to the United States in 1947, to Canada in 1945 and to Australia in 1949.

[421] P. F. Gonidec, quoted by G. Tixier in "La succession à la régie des chemins de fer de l'A.O.F.", *Annuaire français de droit international, 1965* (Paris), vol. XI, p. 921.

implementation of a monetary reform in Guinea led to that country's leaving the franc area. To that was added the fact that diplomatic relations between the former colonial Power and the newly independent State were severed for a long period. This situation was not conducive to the promotion of a swift solution of the problems of succession of States which arose some twenty years ago. However, it seems that a trend towards a settlement has emerged since the resumption of diplomatic relations between the two States in 1975. But apparently the problem of debts has not assumed a significant dimension in the relations between the two States; it seems to be reduced essentially to questions regarding civil and military pensions.

(22) Among other newly independent States which had formerly been French dependencies in Africa, the case of Madagascar[422] may be noted. Madagascar, like all former French overseas territories in general, had legal personality, implying a degree of financial autonomy. The island was thus able to subscribe loans and exercised that right on the occasion of five public loans, in 1897, 1900, 1905, 1931 and 1942. The decision in principle to issue a loan was made in Madagascar by the Governor-General, after hearing the views of various administrative organs and economic and financial delegations. If the process had stopped there and it had been possible for the public actually to subscribe to the loan, the debt would simply have been contracted within the framework of the financial autonomy of the dependent territory. The loan would then have had to be termed a "debt proper to the territory" and could not have been attributed to the predecessor State; consequently, it would not have been considered within the scope of the present commentary.[423] It appears, however, that a further decision had to be taken by the administering Power. The decision-making process, begun in Madagascar, was completed within the framework of the laws and regulations of the central Government of the administering Power. Approval could have been given either by a decree adopted in the Conseil d'Etat or by statute. In actual fact, all the Malagasy loans were the subject of legislative authorization by the metropolitan country.[424] This authorization might be said to have constituted a substantial condition of the loan, a *sine qua non*, without which the issue of the loan would have been impossible. The power to enter into a genuine commitment in this regard lay only, it would seem, with the administering Power, and by so doing, it assumed an obligation which might be compared with the guarantees required by IBRD, which confer on the predecessor State the status of "primary obligor" and not of "surety merely" (see paras. (54) to (57) below).

(23) These debts were assumed by the Malagasy Republic, which, it appears, did not dispute them at the time. The negotiators of the Franco-Malagasy Agreement of 27 June 1960 on co-operation in monetary, economic and financial matters thus did not work out any special provisions for this succession. Later, following a change of regime, the Government of Madagascar, denounced the 1960 Agreement on 25 January 1973.[425]

(24) The former Belgian Congo acceded to independence on 30 June 1960, in accordance with article 259 of the Belgian Act of 19 May 1960. Civil war erupted, and diplomatic relations between the two States were severed from 1960 to 1962. The problems of succession of States were not resolved until five years later, in two conventions dated 6 February 1965. The first related to "the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony".[426] The second concerns the statutes of "the Belgo-Congolese Amortization and Administration Fund".[427]

(25) The classification of debts was made in article 2 of the Convention for the settlement of questions relating to the public debt and portfolio of the Belgian Congo Colony, which distinguished three categories of debt: (1) "Debt expressed in Congolese francs and the debt expressed in foreign currencies held by public agencies of the Congo as at 30 June 1960 . . ."; (2) "Debt expressed in foreign currencies and guaranteed by Belgium . . ."; (3) "Debt expressed in foreign currencies and not guaranteed by Belgium (except the securities of such debt held by public agencies of the Congo) . . .". This classification thus led ultimately to a distinction between the internal debt and the external debt.

(26) The internal debt should not engage our attention for long; not because it was "internal", but because it was held by public agencies of the Congo,[428] or as one writer specifies, "three quarters" of it was.[429] It was thus intermingled with the debts of local public authorities and hence cannot be regarded as a State debt of the predecessor State.

(27) The external debt was subdivided into guaranteed external debt and non-guaranteed external debt. The external debt guaranteed or assigned by Belgium extended to two categories of debt, which are set out in schedule 3 annexed to the above convention.[430] The first concerns the Congolese debt in respect of which Belgium intervened only as guarantor. It was a debt denominated in foreign currencies (United States dollars, Swiss francs and other currencies). In this category, mention may be made of the loan agreements concluded between the Belgian Congo and the World Bank, which are referred to in article 4 of the Belgo-Congolese Agreement. The guarantee and liability of

[422] See Bardonnet, *op. cit.*

[423] For a different reason, the first Malagasy loan of 1897 must be disregarded in the present commentary. It was subscribed for a term of 60 years, and redemption was completed in 1957, prior to the date of independence. Whether it is defined as a debt exclusive to the territory or a debt of the metropolitan country, this loan clearly does not concern the succession of States. It remains an exclusively colonial affair. The other loans do concern the succession of States because their financial consequences continued to have an effect in the context of decolonization.

[424] See Act of 5 April 1897; Act of 14 April 1900; Act of 19 March 1905; Act of 22 February 1931; Act of 16 April 1942. For further details, see the table of Malagasy public loans in Bardonnet, *op. cit.*, p. 650.

[425] See Rousseau, *Droit international public (op. cit.)*, p. 454.

[426] United Nations, *Treaty Series*, vol. 540, p. 227.

[427] *Ibid.*, p. 275.

[428] A list of these agencies and funds is annexed to the Convention (*ibid.*, p. 253).

[429] C. Leieune, "Le contentieux financier belgo-congolais", *Revue belge de droit international* (Brussels), 1969-2, p. 546.

[430] United Nations, *Treaty Series*, vol. 540, p. 255.

Belgium could naturally not extend, with regard to the IBRD loans, beyond "the amounts withdrawn by the Belgian Congo . . . before 30 June 1960", i.e. before independence. When it gave its guarantee, it seemed that Belgium intended to act "as primary obligor and not as surety merely". According to the actual provisions of the agreements with IBRD, the character of State debt of the predecessor State emerges even more clearly for the second category of debt guaranteed by Belgium.

(28) The second type of external debt was called "assigned" debt; it relates to "loans subscribed by Belgium, the proceeds of which were assigned to the Belgian Congo".[431] This is a particularly striking illustration of a State debt of the predecessor State. Belgium was no longer a mere guarantor. The obligation fell directly on Belgium, and it was that country which was the debtor.

(29) The two types of debt, guaranteed and assigned, were to become the responsibility of Belgium. That is what is provided by article 4 of the Convention for the settlement of questions relating to the public debt, in the following terms:

> 1. Belgium shall assume sole liability in every respect for the part of the public debt listed in schedule 3, which is annexed to this Convention and which forms an integral part thereof. [The preceding paragraphs describe the contents of schedule 3.]
>
> . . .
>
> 2. With regard to the Loan Agreements concluded between the Belgian Congo and the International Bank for Reconstruction and Development, the part of the public debt referred to in paragraph 1 of this article shall comprise only the amounts withdrawn by the Belgian Congo, under those Agreements, before 30 June 1960.[432]

(30) The external debt not guaranteed by Belgium, which was expressed in foreign currency in the case of the "Dillon loan" issued in the United States and in Belgian currency in the case of other loans, was owed, as one writer says, to "people who have been referred to as 'the holders of colonial bonds', 95 per cent of whom were Belgians".[433] What would seem to have been involved was a kind of "colonial debt", which would be outside the scope of consideration of the present commentary. It might be relevant, however, according to another author's view, "that the financial autonomy of the Belgian Congo was purely formal in nature and that the administration of the colony was completely in the hands of the Belgian authorities".[434] However, neither Belgium nor the Congo agreed to have that debt devolve upon it, and the two countries avoided the difficulty by setting up a special international agency to handle the debt. That is the significance of articles 5 to 7 of the Convention for the settlement of questions relating to the public debt, which established a Fund.[435]

(31) The establishment of the Fund, an "autonomous international public agency", and the arrangement for joint contributions to it implied two things:

(*a*) Neither State in any sense accepted the status of debtor. That is made clear by article 14 of the Convention:

> The settlement of the public debt of the Belgian Congo, which is the subject of the foregoing provisions, constitutes a solution in which each of the High Contracting Parties reserves its legal position with regard to recognition of the public debt of the Belgian Congo.

(*b*) The two States nevertheless regarded the matter as having been finally settled. That is stated in the first paragraph of article 18 of the Convention:

> The foregoing provisions being intended to constitute a final settlement of the problems to which they relate, the High Contracting Parties undertake to refrain in the future from any discussion and from any action or recourse whatsoever in connection either with the public debt or with the portfolio of the Belgian Congo. Each Party shall hold the other harmless, fully and irrevocably, for any administrative or other act performed by the latter Party in connection with the public debt and portfolio of the Belgian Congo before the date of the entry into force of this Convention.

(32) In the case of the independence of Algeria, article 18 of the "Declaration of Principles concerning Economic and Financial Co-operation", contained in the Evian Agreements,[436] provided for the succession of the Algerian State to France's rights and obligations in Algeria. However, neither this declaration of principles nor the other declarations contained in the Evian Agreements referred specifically to public debts, much less to the various categories of such debts, so that authors have taken the view that the Agreements were silent on the matter.[437]

(33) Negotiations on public debts were conducted by the two countries from 1963 until the end of 1966. They resulted in a number of agreements, the most important of which was the agreement of 23 December 1966, which settled the financial differences between the two countries through the payment by Algeria to France of a lump sum of 400 million francs (40 billion old francs). Algeria does not seem to have succeeded to the "State debts of the predecessor State" by making the payment, since, if it had so succeeded, it would have paid the money not to the predecessor State (which would by definition have been the debtor), but to any third parties to which France owed money in connection with its previous activities in Algeria. What was involved was, rather, debts which might be termed "miscellaneous" debts, resulting from the take-over of all public services by the newly independent State, assumed by it as compensation for that take-over or in respect of the repurchase of certain property. Also included were *ex post facto* debts covering what the successor State had to pay to the predecessor State as a final settlement of the succession of States. Algeria was not assuming France's State debts (to third States) connected with its activities in Algeria.

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[431] *Ibid.*, p. 257.

[432] *Ibid.*, p. 231.

[433] Lejeune, *loc. cit.*, p. 546.

[434] Rousseau, *Droit international public (op. cit.)*, p. 453.

[435] See art. 5, para. 1 of the Convention:

> "Belgium and the Congo jointly establish, by this Convention, an autonomous international public agency to be known as 'the Belgo-Congolese Amortization and Administration Fund', hereinafter referred to as 'the Fund'. The Statutes of the Fund shall be established by a separate Convention."

The Fund was to receive an annual contribution in Belgian francs from the two States, two-fifths of which was to come from Belgium and three-fifths from the Congo (art. 11 of the Convention).

[436] Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria (United Nations, *Treaty Series*, vol. 507, p. 25).

[437] Rousseau, *Droit international public (op. cit.)*, p. 454, and O'Connell, *State Succession . . . (op. cit.)*, pp. 444-446.

(34) In the negotiations, Algeria argued that it had agreed to succeed to France's "obligations" only in return for certain French commitments to independent Algeria. Under the aforementioned "Declaration of principles", a French contribution to the economic and social development of Algeria and "Marketing facilities on French territory for Algerian surplus production" (wine)[438] were to be the *quid pro quo* for the obligations assumed by Algeria under article 18 of the Declaration. The Algerian negotiators maintained that that "contractual" undertaking between Algeria and France could only be regarded as valid if two conditions were met: (*a*) that the respective obligations were properly balanced, and (*b*) that the financial situation inherited by Algeria was a sound one.

(35) Algeria also refused to assume debts representing loans which France had contracted during the war of independence for the purpose of carrying out economic projects in Algeria. The Algerian delegation argued that the projects had been undertaken in a particular political and military context in order to advance the interests of the French settlers and of the French presence in general and that they fell within the overall framework of France's economic strategy, since nearly all of France's investment in Algeria had been complementary in nature. The Algerians also argued that the departure of the French population during the months preceding independence had resulted in massive disinvestment and that Algeria could not pay for investments at a time when the necessary income had dried up and, in addition, a process of disinvestment had developed.

(36) The Algerian negotiators stated that a substantial part of the economic programme in Algeria had had the efffect of incurring debts for that country while it still had dependent status. They argued that, during the seven-and-a-half years of war, the administering Power had for political reasons been over-generous in pledging Algeria's backing for numerous loans, thus seriously compromising the Algerian treasury. Finally, the Algerian negotiators refused to assume certain debts they considered to be "odious debts" or "war debts", which France had charged to Algeria.

(37) This brief account, which shows the extent of the controversy surrounding even the question how to refer to the debts (French State debts or debts proper to the dependent territory), gives an indication of the complexity of the Algerian-French financial dispute, which the negotiators finally settled at the end of 1966.[439]

(38) As to the independence of British dependencies, it would appear that borrowings of British colonies were made by the colonial authorities and were charges on colonial revenues alone.[440] The general practice appears to have been that, upon attaining independence, former British colonies succeeded to four categories of loans: loans under the Colonial Stock Acts; loans from IBRD; colonial welfare and development loans; and other raisings in the London and local stock market.[441] It would therefore seem that such debts were considered to be debts proper to the dependent territory and hence might be outside the scope of the draft articles, in view of the definition of State debts as those of the predecessor State.

Financial situation of newly independent States

(39) International law cannot be codified or progressively developed in isolation from the political and economic context in which the world is living at present. The Commission believes that it must reflect the concerns and needs of the international community in the rules which it proposes to that community. For that reason, it is impossible to evolve a set of rules concerning State debts for which newly independent States are liable without to some extent taking into account the situation in which a number of these States are placed.

(40) Unfortunately, statistical data are not available to show exactly how much of the extensive debt problem of these countries is due to the fact of their having attained independence and assumed certain debts in connection with the succession of States, and how much to the loans which they have had to contract as sovereign States in an attempt to overcome their underdevelopment.[442] Similarly, the relevant statistics covering all the developing countries cannot easily be broken down in order to individualize and illustrate the specific situation of the newly independent States since the Second World War. The figures given below relate to the external debt of the developing countries; they include the Latin American countries—i.e., countries decolonized long ago. Here the aim is not so much to calculate precisely the financial burden resulting from the assumption by the newly independent States of the debts of the predecessor States as to highlight a dramatic and widespread debt problem affecting the majority of the developing countries. This context and this situation impart particular and specific overtones to succession of States involving newly independent States that do not generally arise in connection with other types of succession.

(41) The increasingly burdensome debt problem of these countries has become a structural phenomenon whose profound effects were apparent long before the present international economic crisis. In 1960, the developing countries' external public debt already amounted to several billion dollars. During the 1960s, the total indebtedness of the 80 developing countries studied by UNCTAD increased at an annual rate of 14 per cent, so that at the end of 1969 the external public debt of these 80 countries amounted to $59 billion.[443] It

[438] United Nations, *Treaty Series*, vol. 507, pp. 57 and 59.

[439] One writer has stated that the 1966 agreement constituted "a compromise" (Rousseau, *Droit international public (op. cit.)*, p. 454).

[440] O'Connell, *State Succession . . . (op. cit.)*, p. 423.

[441] *Ibid.*, p. 424.

[442] The statistics published or made available by international economic or financial organizations are not sufficiently detailed to enable a distinction to be drawn between debts which predate and debts which postdate independence. OECD has published various studies and numerous tables giving a breakdown of debts by debtor country, type of creditor and type of debt, but with no indication of whether the debts are "colonial debts" (OECD, *Total external liabilities of developing countries* (Paris, 1974)).

[443] See report by the UNCTAD secretariat entitled *Debt problems of developing countries* (United Nations publication, Sales No. E.72.II.D.12), para. 12.

was estimated that at the same date the total sums disbursed by those countries simply for servicing the public debt and repatriation of profits was $11 billion.[444] At that time already, in certain developing countries the servicing of the public debt alone consumed over 20 per cent of their total export earnings. In its annual report for 1980, the World Bank estimated that by the end of 1979, the outstanding medium-term and long-term dispersed debt from public and private sources of developing countries would reach $376 billion.[445] Service payments on that debt were estimated to amount to $69 million.

(42) This considerable increase in the external debt placed an unbearable burden on certain countries, particularly a number of developing countries which faced an alarming situation:

> During the past years, a growing number of developing countries have experienced debt crises which warranted debt relief operations. Multilateral debt renegotiations were undertaken, often repeatedly, for Argentina, Bangladesh, Brazil, Chile, Ghana, India, Indonesia, Pakistan, Peru and Turkey. In addition, around a dozen developing countries were the subject of bilateral debt renegotiations. Debt crises have disruptive effects on the economies of developing countries and a disturbing influence on creditor/debtor relationships. Resource providers and recipients should therefore ensure that the international resource transfer is effected in such a way that it avoids debt difficulties of developing countries.[446]

(43) The considerable increase in inflation in the industrialized economies that began in 1973 was to have serious consequences for the developing countries, which depend heavily on those economies for their imports, and thus aggravated their external debt.

(44) The current deficit of these non-oil-exporting countries increased from $9.1 billion in 1973 to $27.5 billion in 1974 and $35 billion in 1976.[447] These deficits resulted in a huge increase in the outstanding external debt of the developing countries and in the service payments on that debt in 1974 and 1975. A recent study by IMF reveals that the total outstanding guaranteed public debt of these countries increased from about $62 billion in 1973 to an estimated $95.6 billion in 1975—an increase of over 50 per cent.[448]

(45) In addition, while the developing countries' indebtedness was increasing, the relative value of official development assistance was declining, the volume of such transfers having remained far below the minimum of 1 per cent of GNP called for by the International Development Strategy. In addition to and simultaneously with this trend, there was a considerable increase in reverse transfers of resources in the form of repatriation of profits made by investors from developed countries in developing countries. The increase in the absolute value of resources transferred to the developing countries in fact conceals a worsening of the debt situation of those countries. It has been estimated that the total percentage of export earnings used for debt service was 29 per cent in 1977, compared with 9 per cent for 1965.

(46) Concern about the debt problem has been reflected in the proceedings of many international meetings, of which those mentioned in this and the following paragraphs may serve as illustrations. Arrangements agreeable to both developing countries and industrialized creditor States to remedy this dramatic situation have not been easy to reach. The debtor countries have indicated that, in their view, their indebtedness is such that, if it is not readjusted, it may cancel out any development effort.[449]

(47) The issue of cancellation of the debts of the former colonized countries has been raised by certain newly independent States.[450] The General Assembly, by resolution 3202 (S-VI) of 1 May 1974, adopted the "Programme of Action on the Establishment of a New International Economic Order", which provided in section II, 2 that all efforts should be made to take, *inter alia*, the following measures:

> (*f*) Appropriate urgent measures, including international action, should be taken to mitigate adverse consequences for the current and future development of developing countries arising from the burden of external debt contracted on hard terms;

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[444] See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. III, *Financing and invisibles* (United Nations publication, Sales No. E.73.II.D.6), "The outflow of financial resources from developing countries: note by the UNCTAD secretariat" (TD/118/Supp.5), para. 4.

[445] IBRD, *Annual Report, 1980* (Washington, D.C.), pp. 20-21.

[446] OECD, *Debt problems of developing countries* (Paris, 1974), p. 2.

[447] IMF, "World economic outlook: Developments and prospects in the non-oil primary producing countries", p. 4, table 1.

[448] *Ibid.*, table 8.

[449] At the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held at Algiers from 5-9 September 1973, the problem was stated as follows:

> "The adverse consequences for the current and future development of developing countries arising from the burden of external debt contracted on hard terms should be neutralized by appropriate international action . . .
>
> "Appropriate measures should be taken to alleviate the heavy burden of debt-servicing, including the method of rescheduling." (Documents of the Fourth Conference of Heads of State or Government of Non-Aligned Countries. "Action programme for economic co-operation", section entitled "International monetary and financial system", paras. 6-7 (A/9330, p. 92).)

[450] Speaking at the sixth special session of the United Nations General Assembly, in his capacity as Chairman of the Fourth Conference of Heads of State or Government of Non-Aligned Countries, the Head of State of Algeria declared:

> "In this regard it would be highly desirable to examine the problem of the present indebtedness of the developing countries. In this examination, we should consider the cancellation of the debt in a great number of cases and, in other cases, refinancing on better terms as regards maturity dates, deferrals and rates of interest." (*Official Records of the General Assembly, Sixth Special Session, Plenary Meetings*, 2208th meeting, para. 136.)

At the second session of the United Nations Conference on Trade and Development, held at New Delhi, Mr. L. Nègre, Minister of Finance of Mali, said at the 58th plenary meeting:

> "Many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign powers . . . the developing countries asked their creditors to show a greater spirit of equity and suggested that, during the present Conference, they might decree . . . the cancellation of all debts contracted during the colonial period . . . ". (*Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I (and Corr.1 and 3 and Add.1 and 2), *Report and annexes* (United Nations publication, Sales No. E.68.II.D.14), annex V, para. 7.)

During an official visit to French-speaking Africa, the President of the French Republic, Georges Pompidou, decided to cancel a debt of about 1 billion francs owed by 14 African countries. That gesture, which was well received, does not fall within the scope of this draft, which is not concerned with the debt-claims of the predecessor State (which constitute State property of that State). See *Journal officiel de la République française, Lois et décrets* (Paris), vol. 106, No. 170 (20 July 1974), p. 7577.

(*g*) Debt renegotiation on a case-by-case basis with a view to concluding agreements on debt cancellation, moratorium, rescheduling or interest subsidization.

(48) Resolution 31/158, adopted by the General Assembly of the United Nations on 21 December 1976, concerning "Debt problems of developing countries", states:

The General Assembly,

. . .

Convinced that the situation facing the developing countries can be mitigated by decisive and urgent relief measures in respect of . . . their official . . . debts . . .,

Acknowledging that, in the present circumstances, there are sufficient common elements in the debt-servicing difficulties faced by various developing countries to warrant the adoption of general measures relating to their existing debt,

Recognizing the especially difficult circumstances and debt burden of the most seriously affected, least developed, land-locked and island developing countries,

1. *Considers* that it is integral to the establishment of the new international economic order to give a new orientation to procedures of reorganization of debt owed to developed countries away from the past experience of a primarily commercial framework towards a developmental approach;

2. *Affirms* the urgency of reaching a general and effective solution to the debt problems of developing countries;

3. *Agrees* that future debt negotiations should be considered within the context of internationally agreed development targets, national development objectives and international financial co-operation, and debt reorganization of interested developing countries carried out in accordance with the objectives, procedures and institutions evolved for that purpose;

4. *Stresses* that all these measures should be considered and implemented in a manner not prejudicial to the credit-worthiness of any developing country;

5. *Urges* the International Conference on Economic Co-operation to reach an early agreement on the question of immediate and generalized debt relief of the official debts of the developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, and on the reorganization of the entire system of debt renegotiations to give it a developmental rather than a commercial orientation;

. . .

(49) The Conference on International Economic Co-operation (sometimes referred to as the "North-South Conference") did not reach final agreement on the issue of debt relief or reorganization. The General Assembly, on 19 December 1977, adopted resolution 32/187 entitled "Debt problems of developing countries", which reads, *inter alia*:

The General Assembly,

. . .

Concerned that many developing countries are experiencing extreme difficulties in servicing their external debts and are unable to pursue or initiate important development projects, that the growth performance of the most seriously affected, least developed, land-locked and island developing countries during the first half of this decade has been extremely unsatisfactory and that their *per capita* incomes have hardly increased,

Considering that substantial debt-relief measures in favour of developing countries are essential and would result in a significant infusion of untied resources urgently required by many developing countries,

. . .

Noting that the Special Action Programme of $1 billion offered by the developed donor countries at the Conference on International Economic Co-operation will cover less than one third of the annual debt-service payments of the most seriously affected and the least developed countries, and that substantive action has yet to be taken by them to implement the Programme,

. . .

2. *Calls upon* the Trade and Development Board at its ministerial session to reach satisfactory decisions on:

(*a*) Generalized debt relief by the developed countries on the official debt of developing countries, in particular of the most seriously affected, least developed, land-locked and island developing countries, in the context of the call for a substantial increase in net official development assistance flows to developing countries;

(*b*) Reorganization of the entire system of debt renegotiation to give it a developmental orientation so as to result in adequate, equitable and consistent debt reorganizations;

(*c*) The problems created by the inadequate access of the majority of developing countries to international capital markets, in particular the danger of the bunching of repayments caused by the short maturities of such loans;

3. *Welcomes* the steps taken by some developed countries to cancel official debts owed to them by certain developing countries and the decision to extend future official development assistance in favour of the most seriously affected and the least developed of the developing countries in the form of grants, and urges that this be followed by similar decisions;

4. *Recommends* that additional financial resources should be committed by multilateral development finance institutions to the developing countries experiencing debt-servicing difficulties.

(50) In response to General Assembly resolution 32/187, the Trade and Development Board, at the third (ministerial) part of its ninth special session, adopted resolution 165 (S-IX) on "Debt and development problems of developing countries". That resolution states, *inter alia*:

The Trade and Development Board,

. . .

Noting the pledge given by developed countries to respond promptly and constructively, in a multilateral framework, to individual requests from developing countries with debt-servicing difficulties, in particular the least developed and most seriously affected among these countries,

Recognizing the importance of features which could provide guidance in future operations relating to debt problems as a basis for dealing flexibly with individual cases,

Recalling further the commitments made internationally by developed donor countries to increase the volume and improve the quality of their official development assistance,

Aware that means to resolve these problems are one of the urgent tasks before the international community,

Agrees to the following decisions:

A

1. Members of the Board considered a number of proposals made by developing countries and by developed market-economy countries.

2. The Board recognized that many poorer developing countries, particularly the least developed among them, face serious development problems and in some instances serious debt-service difficulties.

3. The Board notes with interest the suggestions made by the Secretary-General of UNCTAD with respect to an adjustment of terms of past bilateral official development assistance in order to bring them into line with the currently prevailing softer terms.

4. Developed donor countries will seek to adopt measures for such an adjustment of terms of past bilateral official development assistance, or other equivalent measures, as a means of improving

the net flows of official development assistance in order to enhance the development efforts of those developing countries in the light of internationally agreed objectives and conclusions on aid.

5. Upon undertaking such measures, each developed donor country will determine the distribution and the net flows involved within the context of its own aid policy.

6. In such a way, the net flows of official development assitance in appropriate forms and on highly concessional terms should be improved for the recipients.

. . .

B

8. In accordance with Conference resolution 94 (IV), the Board reviewed the intensive work carried on within UNCTAD and other international forums on the identification of those features of past situations which could provide guidance for future operations relating to debt problems of interested developing countries.

9. The Board notes with appreciation the contributions made by the Group of 77 and by some members of Group B.

10. Common to the varying approaches in this work are certain basic concepts which include, *inter alia*:

(*a*) International consideration of the debt problem of a developing country would be initiated only at the specific request of the debtor country concerned;

(*b*) Such consideration would take place in an appropriate multilateral framework consisting of the interested parties, and with the help as appropriate of relevant international institutions to ensure timely action, taking into account the nature of the problem, which may vary from acute balance-of-payments difficulties requiring immediate action to longer term situations relating to structural, financial and transfer-of-resources problems requiring appropriate longer term measures;

(*c*) International action, once agreed by the interested parties, would take due account of the country's economic and financial situation and performance, and of its development prospects and capabilities and of external factors, bearing in mind internationally agreed objectives for the development of developing countries;

(*d*) Debt reorganization would protect the interests of both debtors and creditors equitably in the context of international economic co-operation.

. . .[451]

(51) On 5 December 1980, the General Assembly, by resolution 35/56, adopted the "International Development Strategy for the Third United Nations Development Decade". Included among the "Policy measures" in section III.D, regarding "Financial resources for development", is the following:

111. Negotiations regarding internationally agreed features for future operations related to debt problems of interested developing countries should be brought to an early conclusion in the light of the general principles adopted by the Trade and Development Board in section B of its resolution 165 (S-IX) of 11 March 1978.

112. Governments should seek to adopt the following debt-relief actions or equivalent measures:

(*a*) Commitments undertaken in pursuance of section A of Trade and Development Board resolution 165 (S-IX) should be fully implemented as quickly as possible;

(*b*) Retroactive adjustment of terms should be continued in accordance with Trade and Development Board resolution 165 (S-IX), so that the improvement in current terms can be applied to outstanding official development assistance debt, and the United Nations Conference on Trade and Development should review the progress made in that regard.

[451] *Official Records of the Trade and Development Board, Ninth Special Session, Supplement No. 1* (TD/B/701).

Rule reflected in article 36

(52) It may, at this juncture, be helpful to recall the scope of Part IV of the draft articles and the provisions of article 31, defining "State debt". As has been noted,[452] debts proper to the territory to which a succession of States relates and contracted by one of its territorial authorities are excluded from the scope of "State debt" in this draft, as they may not properly be considered to be the debts of the predecessor State. In adopting such an approach in the context of decolonization, the Commission is aware that not all problems relating to succession in respect of debts are settled for newly independent States by article 36. In fact, the bulk of the liabilities involved in the succession may not, in the case of decolonization, consist of State debts of the predecessor State. They may be debts said to be "proper to tne dependent territory", contracted under a very formal financial autonomy by the organs of colonization in the territory, which may constitute a considerable volume of liabilities. As has been seen, disputes have frequently arisen concerning the real nature of debts of this kind, which are at times considered by the newly independent State as "State debts" of the predecessor State which must remain the responsibility of the latter. The category of debts directly covered by article 36 is therefore that of debts contracted by the Government of the administering Power on behalf and for the account of the dependent territory. These are, properly speaking, the State debts of the predecessor State, the fate of which upon the emergence of a newly independent State is the subject-matter of the article.

(53) Also excluded are certain debts assumed by a successor State within the context of an agreement or arrangement providing for the independence of the formerly dependent territory. They include "miscellaneous debts" resulting from the takeover by the newly independent State of, for example, all public services. They do not appear to be debts of the predecessor State at the date of the succession of States, but rather correspond to what the successor State pays for the final settlement of the succession of States. Indeed, such debts may be said to represent "debt-claims" of the predecessor State against the successor State for the settlement of a dispute arising on the occasion of the succession of States.[453] Finally, as explained above,[454] the Commission has left aside the question of drafting general provisions relating to "odious debts".

[452] See above, paras. (14) *et seq.* of the commentary to art. 31.

[453] Another category of debts should be excluded: that of the "national" debt of the predecessor State. Such debts would be those contracted by the predecessor State for its own account and for its own national metropolitan use, but part of which it was decided should be borne by its various dependent territories. This category relates to the archaic practices of certain States during the time of colonial empires several centuries ago, which are irrelevant in the contemporary world. It also covers certain rare cases occurring in modern times when the administering Power, in the face of national or international danger (such as the First and Second World Wars), may have contracted loans to sustain its war effort and associated its dependent territories in such efforts by requesting them to contribute. (This does not, of course, relate to military efforts directed against the dependent territory itself.) As this category of debts is exceptionally rare, it was decided to leave it aside in the present context.

[454] See above, paras. (41)-(43) of the commentary to art. 31.

(54) Further in regard to the scope of the present article, State practice concerning the emergence of newly independent States has shown the existence of another category of debts: those contracted by a dependent territory, but with the guarantee of the administering Power. This category includes, in particular, most loans contracted between dependent territories and IBRD. The latter required a particularly sound guarantee from the administering Power. In most, if not all, guarantee agreements[455] concluded between IBRD and an administering Power for a dependent territory, there are two important articles, articles II and III:

Article II

Section 2.01. Without limitation or restriction upon any of the other covenants on its part in this Guarantee Agreement contained, the Guarantor hereby unconditionally guarantees, *as primary obligor and not as surety merely*,* the due and punctual payment of the principal of, and the interest and other charges on, the Loan . . .

Section 2.02. Whenever there is reasonable cause to believe that [the borrower] will not have sufficient funds to execute or to arrange the execution of the project in conformity with the Loan Agreement, the Guarantor, in consultation with the Bank and the borrower, will take the measures necessary to help the borrower to obtain the additional funds required.

Article III

Section 3.01. It is the mutual understanding of the Guarantor and the Bank that, except as otherwise herein provided, the Guarantor will not grant in favour of any external debt any preference or priority over the Loan . . .

. . .

(55) In the case of a guaranteed debt, the guarantee furnished by the administering Power legally creates a specific obligation for which it is liable, and a correlative subjective right of the creditor. If the succession of States had the effect of extinguishing the guarantee altogether and thus relieving the predecessor State of one of its obligations, a right of the creditor would unjustifiably disappear. The problem is not, therefore, to determine what happens to the debt proper to the dependent territory—which, it appears, is in fact normally assumed by the newly independent State—but rather to ascertain what becomes of the element by which the debt is supported, furnished in the form of a guarantee by the administering Power. In other words, what is at issue is not succession to the debt proper to the dependent territory, but succession to the obligation of the predecessor State in respect of the territory's debt.

(56) The practice followed by IBRD in this regard seems clear. The Bank turns first to the newly independent State, for it considers that the loan agreements signed by the dependent territory are not affected by a succession of States as long as the debtor remains identifiable. For the purposes of these loan agreements, IBRD seems to consider, as it were, that the succession of States has not changed the identity of the entity which existed before independence. However, the World Bank considers—and the predecessor State which has guaranteed the loan does not in any way deny—that the legal effects of the contract of guarantee continue to operate after the territory has become independent, so that the Bank can at any time turn to the predecessor State if the successor State defaults. The practice of the World Bank shows that the predecessor State cannot be relieved of its guarantee obligation as the principal debtor unless a new contract is concluded to this effect between IBRD, the successor State and the predecessor State, or between the first two for the purpose of relieving the predecessor State of all charges and obligations which it assumed by virtue of the guarantee given by it earlier.

(57) Bearing these considerations in mind, the Commission considers it sufficient to note that a succession of States does not as such effect a guarantee given by a predecessor State for a debt assumed by one of its formerly dependent territories.

(58) In the search for a general solution to the question of the fate of State debts of the predecessor State upon the emergence of a newly independent State, some writers have stressed the criterion of the utility or actual benefit which the loan afforded to the formerly dependent territory.[456] While such a criterion may appear useful at first glance, it is clear that if established as the basic rule governing the matter at issue, it would be extremely difficult to apply in practice. During a regional symposium held at Accra by UNITAR in 1971, the question was raised in the following terms:

> To justify the transfer of debts to a newly independent State, it was argued . . . that, since in a majority of cases the metropolitan Power made separate fiscal arrangements for the colony, it would be possible to determine the nature and extent of such debts. One speaker argued that any debt contracted on behalf of a given colony was not necessarily used for the benefit of that colony. He suggested that perhaps the determining factor should be whether the particular debt was used for the benefit of the colony. Although this point was generally acceptable to several delegates, doubt was raised as regards how the utility theory would in practice be applied, i.e., who was to determine and in what manner the amount of the debt which had actually been used on behalf of the colony.[457]

(59) In the case of loans granted to the administering Power for the development of the dependent territory (criterion of intended use and allocation), the colonial context in which the development of the territory may have taken place as a result of these loans must be kept in mind. It is by no means certain that the investment in question did not primarily benefit a foreign colonial settlement or the metropolitan economy of the administering Power.[458] Even if the successor State retained some "trace" of the investment, in the form, for example, of public works infrastructures, such infrastructures might be obsolete or unusable in the context of decolonization, with the new orientation of the economy or the new planning priorities decided upon by the newly independent State.

[455] See, for example, the Guarantee Agreement (Northern Rhodesia-Rhodesia Railways Project) between the United Kingdom and IBRD, signed at Washington on 11 March 1953 (United Nations, *Treaty Series*, vol. 172, p. 115).

[456] Sánchez de Bustamante y Sirvén, *op. cit.*, pp. 279-280.

[457] Report of the United Nations Regional Symposium on International Law for Africa, 14-28 January 1971, Accra (Ghana), organized by UNITAR at the invitation of the Ghanaian Government, p. 9.

[458] Mention may be made of art. 255, sect. 2, of the Treaty of Versailles (see footnote 342 above), which provided that:

> "In the case of Poland that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland shall be excluded from the apportionment to be made under Article 254."

(60) Another factor to be taken into account in the drafting of a general rule concerning the subject-matter of this article is the capacity of the newly independent State to pay the relevant debts of the predecessor State. This factor has arisen in State practice in connection with cases other than that of newly independent States. The Permanent Court of Arbitration, in the *Russian Indemnity* case[459] of 1912, recognized that:

> The defence of *force majeure* . . . may be pleaded in public as well as in private international law: international law must adapt itself to political necessities.[460]

The treaties of peace concluded at the end of the First World War seem to indicate that, in the apportionment of predecessor State debts between various successor States, the financial capacity of the latter States, in the sense of future paying capacity (or contributing capacity), was in some cases taken into account.[461] One author quotes an example of State practice in 1932, in which the creditor State (the United States) declared in a note to the debtor State (the United Kingdom) that the principle of capacity to pay did not require that the foreign debtor should pay to the full limit of its present or future capacity, as no settlement which was oppressive and which delayed the recovery and progress of the foreign debtor was in accordance with the true interest of the creditor.[462]

(61) Transposed to the context of succession to debts in the case of newly independent States, these considerations relating to the financial capacity of the debtor are of great importance in the search for a basic rule governing such succession. The Commission is not unaware of the fact that cases of "State default" involve debts already recognized by and assigned to the debtor whereas, in the cases with which this article is concerned, the debt is not yet "assigned" to the successor State and the whole problem is first to decide whether the newly independent State must be made legally responsible for such a debt before deciding whether it can assume it financially. Nevertheless, the two questions must be linked if practical and just solutions are to be found for situations in which prevention is better than cure. It may be asked what purpose is served by affirming in a rule that certain debts are transferable to a newly independent State if its economic and financial difficulties are already known in advance to constitute a substantial impediment to the payment of such debts.[463] Admittedly, taking into account explicitly in a draft article the "financial capacity" of a State would involve a somewhat vague phrase and might leave the way open for abuses. On the other hand, it is neither possible nor realistic to ignore the reasonable limits beyond which the assumption of debts would be destructive for the debtor and without result for the creditor.

(62) The above general considerations concerning the capacity to pay must be viewed in relation to the developments occurring in contemporary international relations concerning the principle of the permanent sovereignty of every people over its wealth and natural resources, which constitutes a fundamental element in the right of peoples to self-determination.[464] This principle, as it emerges from United Nations practice, is of substantial significance in the context of the financial capacity of newly independent States to succeed to State debts of the predecessor State which may have been linked to such resources (which may for example have been pledged as security for a debt). Thus the traditional issue of "capacity to pay" must be seen in its contemporary framework, taking into account the present financial situation of newly independent States as well as the implications of the paramount right of self-determination of the peoples and the principle of the permanent sovereignty of every people over its wealth and natural resources.

(63) In attempting to draft a basic rule applicable to succession to State debts of the predecessor State by newly independent States, the Commission has approached its task by drawing inspiration from Article 55 of the United Nations Charter:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> *a.* higher standards of living, full employment, and conditions of economic and social progress and development;
>
> *b.* solutions of international economic, social, health, and related problems; and international cultural and educational co-operation;
>
> . . .

Stability and orderly relations between States, which are necessary for peaceful and friendly relations, cannot be divorced from the principles of equal rights and self-determination of peoples or from the overall efforts of the present-day international community to promote conditions of economic and social progress and to provide solutions of international economic problems. Neither State practice nor the writings of jurists provide clear and consistent answers to the question of the fate of State debts of the former metropolitan Power. Thus, the Commission is aware that, in drawing up rules governing the subject-matter, it is inevitable that a measure of progressive development of the law should be involved. State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles, and serious divergences of views, which continue to manifest themselves many years after the purported settlement of a succession of States. It is true, nevertheless, that in many cases the State debts of the predecessor metropolitan State have not passed to the newly independent State. The Commission cannot but recognize certain realities of present-day international life, in particular the severe burden of debt reflected in the financial situation of a number of newly independent States; nor can it ignore, in the drafting of legal rules governing succession to

[459] United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 421.

[460] *Ibid.*, p. 443. [Translation by the Secretariat.]

[461] See Rousseau, *Droit international public* (*op. cit.*), pp. 442-447, 464-466, and Feilchenfeld, *op. cit.*, pp. 458-461, 852-856.

[462] Jèze, "Les défaillances d'Etat" (*loc. cit.*), p. 392.

[463] "Reconstruction of their economies by several new States has raised questions of the continuity of financial and economic arrangements made by the former colonial Powers or by their territorial administrations." ILA, *op. cit.*, p. 102.

[464] See above, paras. (26) to (29) of the commentary to art. 14.

State debts in the context of decolonization, the legal implications of the fundamental right to self-determination of peoples and of the principle of the permanent sovereignty of every people over its wealth and natural resources. The Commission considered the possibility of drafting a basic rule that would provide for the passing of such debts if the dependent territory actually benefited therefrom. But, as was indicated above (paras. (58) and (59)), that criterion taken alone seems difficult to apply in practice, and does not provide for stable and friendly solution of the problems. It should not be forgotten that the subject-matter at issue—the succession of a newly independent State to State debts of a metropolitan Power—takes place wholly within the context of decolonization, which imports special and unique considerations not found in other types of succession of States. The latter consideration also implies the necessity to avoid such general language as "equitable proportion", which has proved appropriate in other types of succession but which would raise serious questions of interpretation and possible abuse in the context of decolonization.

(64) The Commission, in the light of all the above considerations, decided to adopt as a basic rule the rule of the non-passing of the State debt of the predecessor State to the successor State. This rule is found in the *first part of paragraph 1* of article 36, which states: "no State debt of the predecessor State shall pass to the newly independent State . . .". Having thus provided for the basic rule of non-passing, however, the Commission did not wish to foreclose the important possibility of an agreement on succession in respect of State debts being validly and freely concluded between the predecessor and successor States. The Commission was fully aware that newly independent States often need capital investment and that it should avoid formulating rules which might discourage States or financial international organizations from providing the necessary assistance. Thus, the *second part of paragraph 1* of article 36 is intended to follow the spirit of other provisions of the draft which encourage the predecessor and successor States to settle the question of the passing of State debts by agreement between themselves. Of course, it must be emphasized that such agreements must be validly concluded, pursuant to the will freely expressed by both parties. To bring that consideration more sharply into focus, the second part of paragraph 1 has been drafted so as to spell out the necessary conditions under which such an agreement should be concluded. Thus, first, the State debt of the predecessor State must be "connected with its activity in the territory to which the succession of States relates." The language generally follows that found in other articles of the draft, already adopted, concerning succession in respect of State property (see, in particular, arts. 13, 14, 16 and 17). Its purpose is clearly to exclude from consideration debts of the predecessor State having nothing to do with its activities as metropolitan Power in the dependent territory concerned. Secondly, the State debt of the predecessor State, connected with its activity in the territory concerned, must be linked with "the property, rights and interests which pass to the newly independent State". If the successor State succeeds to certain property, rights and interests of the predecessor State, as provided for in article 14, it is only natural that an agreement on succession to State debts should take into account the correspondin obligations which may accompany such property, rights and interests. Thus, articles 14 and 36 are closely connected in that respect. While the use of the criterion of "actual benefit" has generally been avoided, it can be seen that certain elements of that criterion have been usefully reflected here: the passing of debts may be settled by agreement in view of the passing of benefits (property, rights and interests) to which those debts are linked.

(65) While the parties to the agreement envisaged in paragraph 1 may freely agree on the provisions to be included therein, the Commission thought it necessary to provide a safeguard clause to ensure that such provisions do not ignore the financial capacity of the newly independent State to succeed to such debts or infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. Such a safeguard, which is included in *paragraph 2*, is particularly necessary in the case of an agreement such as is mentioned in paragraph 1, that is, one concluded between a former metropolitan Power and one of its former dependencies. By paragraph 2, it is intended to underline once again that the agreement must be concluded by the two parties on an equal footing. Thus agreements purporting to establish "special" or "preferential" ties between the predecessor and successor States (often termed "devolution agreements") which in fact impose on the newly independent States terms that are ruinous to their economies, cannot be considered as the type of agreement envisaged in paragraph 1. The article presupposes—and paragraph 2 is intended to reinforce that supposition—that the agreements are to be negotiated in full respect for the principles of political self-determination and economic independence. Hence the express reference to the principle of the permanent sovereignty of every people over its wealth and natural resources and to the fundamental economic equilibria[465] of the newly independent State. The latter expression, "fundamental economic equilibria", must be interpreted in a broad sense, covering all kinds of economic, financial (including indebtedness) and other factors which assure the fundamental equilibria of a newly independent State.

(66) The Commission would further recall certain decisions relating to other articles of the draft which bear upon article 36. The term "newly independent State" has already been defined in article 2, subparagraph 1(*e*) of the draft. Like article 14, article 36 is intended to apply to cases in which the newly independent State is formed from two or more dependent territories. Likewise, the article applies to cases in which a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.[466] The Commission has not thought it

[465] In this connection, attention may be drawn to the fact that the word "disequilibria" is found in art. 60, subpara. 2 (*b*), of the Treaty instituting the European Coal and Steel Community (United Nations, *Treaty Series*, vol. 261, p. 191) and in art. 3, para. (*g*) of the Treaty establishing the European Economic Community (*ibid.*, vol. 298, p. 16).

[466] See para. 75 above.

necessary to deal with the self-evident case of debts of the predecessor State owed to the dependent territory, which continue to be payable to the newly independent State after the date of the succession of States.

(67) When article 36 was adopted on first reading by the Commission at its twenty-ninth session, in 1977, certain members of the Commission were unable to support the text and expressed reservations and doubts thereon. One member expressed reservations on certain paragraphs of the commentary to the article as well.[467] That member also proposed at that time an alternative text for the article,[468] which received a measure of support from some members. Concerning the question of permanent sovereignty over natural resources, that member expressed preference for the terminology found in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[469]

Article 37. Uniting of States

When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

Commentary

(1) Article 37, on the passing of the State debt in the case of uniting of States, corresponds to article 15 in part II, relating to succession in respect of State property, and to article 27 in part III, on succession in respect of State archives. It is not necessary, therefore, to specify again the exact scope of the type of succession in question.[470]

(2) When two or more States unite and so form one successor State, it seems logical for the latter to succeed to the debt of the former just as it succeeds to their property. *Res transit cum suo onere*, the basic rule, is laid down in the single paragraph constituting the article. This rule is generally accepted in legal theory. According to one writer, for instance, "when States merge to form a new State, their debts become the responsibility of that State."[471]

(3) In the practice of States, there seem to be only a few cases where the passing of the State debt upon a uniting of States was settled at the *international* level; questions relating to State debts have usually been regulated by the *internal* law of States. One example of an international arrangement is the union of Belgium and the Netherlands by the Act of 21 July 1814.[472] Article I of the Act provided:

> This union shall be intimate and complete so that the two countries form but one single State, governed by the Constitution already established in Holland, which will be modified by agreement in accordance with the new circumstances.

In view of the "intimate and complete" nature of the union thus achieved, article VI of the Act quite naturally concluded that:

> Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other, shall be borne by the General Treasury of the Netherlands.

The Act of 21 July 1814 was later annexed to the General Act of the Congress of Vienna,[473] and the article VI cited was invoked on a number of occasions to provide guidance for the apportionment of the debts between Holland and Belgium.

(4) A second example that may be cited is the unification of Italy—a somewhat ambiguous example, however, because learned opinion differs in describing the manner in which unity was achieved. As one writer sums it up:

> Some have regarded the Kingdom of Italy as an enlargement of the Kingdom of Sardinia, arguing that it was formed by means of successive annexations to the Kingdom of Sardinia; others have regarded it as a new subject of law created by the merger of all the former Italian States, including the Kingdom of Sardinia, which thus ceased to exist.[474]

In a general way, the Kingdom of Italy acknowledged the debts of the formerly separate States and continued the practice that had already been instituted by the King of Sardinia. Thus, the Peace Treaty of Vienna of 3 October 1866,[475] under which "His Majesty the Emperor of Austria [agrees] to the union of the Lombardo-Venetian Kingdom with the Kingdom of Italy" (art. III), included an article VI which provided as follows:

> The Italian Government shall assume responsibility for:
>
> (1) That part of Monte Lombardo-Veneto which was retained by Austria under the convention concluded at Milan in 1860 in application of article VII of the Treaty of Zurich;[476]

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[467] The member concerned objected to the inclusion of paras. (30) to (50) of the 1977 commentary (see paras. (39) to (48) of the present commentary), particularly on the grounds that, in his view, they contained economic exposition and analysis which were not within the Commission's sphere of competence, and that some aspects of that exposition and analysis were debatable. That member also considered it important to note that a number of States had dissented from elements of the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order quoted in paras. (27) and (28) of the commentary to art. 14.

[468] That text (A/CN.4/L.257) reads as follows:

"*Article 22. Newly independent States*

"1. No debt contracted by the predecessor State on behalf or for the account of a territory which has become a newly independent State shall pass to the newly independent State unless the debt related to property, rights and interests of which the newly independent State is beneficiary and unless that passage of debt is in equitable proportion to the benefits that the newly independent State has derived or derives from the property, rights and interests in question.

"2. Any agreement concluded between the predecessor and the newly independent State for the implementation of the principles contained in the preceding paragraph shall pay due regard to the newly independent State's permanent sovereignty over its natural wealth and resources in accordance with international law."

[469] General Assembly resolution 2200A (XXI) of 16 December 1966, annex.

[470] See above, paras. (1) and (2) of the commentary to art. 15.

[471] Fauchille, *op. cit.*, vol. I, p. 380.

[472] Act signed by the Secretary of State of H.R.H. the Prince of the Netherlands, in acceptance of the sovereignty of the Belgian provinces on the agreed bases. The Hague, 21 July 1814 (Martens, ed., *Nouveau Recueil de Traités (op. cit.)*, vol. II, p. 38).

[473] *Ibid.*, p. 379. See also Feilchenfeld, *op. cit.*, pp. 123-124.

[474] D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), p. 171.

[475] French text in *British and Foreign State Papers, 1865-1866* (London, Ridgway, 1870), vol. LVI, p. 701.

[476] The Treaty of Zurich of 10 November 1859, concluded between Austria and France, ceded Lombardy to France. The "new Government of Lombardy", under art. VII of the Treaty, was to assume three-fifths of the debt of Monte-Lombardo-Veneto (French text in Parry, *op. cit.*, vol. 121, p. 148, and *British and Foreign State Papers, 1858-1859* (London, Ridgway, 1867), vol. XLIX, p. 366).

(2) The additional debts contracted by Monte Lombardo-Veneto between 4 June 1859 and the date of conclusion of this Treaty;

(3) A sum of 35 million Austrian florins, in cash, representing the portion of the 1854 loan attributable to Venetia for the cost of non-transportable war materials . . . .

(5) Certain treaties relating to the uniting of Central American States may also be mentioned. The Treaty of 15 June 1897 concluded by Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador[477] to form the Republic of Central America, as well as the Covenant of Union of Central America of 19 January 1921[478] concluded by Costa Rica, El Salvador, Guatemala and Honduras after the dissolution of the Republic of Central America, contained some provisions relating to the treatment of debts. Although those treaties were more directly concerned with the allocation of debts among the component parts of the united State, there is no doubt that in its international relations the new State as a whole assumed the debts that had been owed by the various predecessor States. The Treaty of 1897, according to which the union had "for its one object the maintenance in its international relations of a single entity" (art. III), provided that:

The pecuniary or other obligations contracted, or which may be contracted in the future, by any of the States are matters of individual responsibility. (art. XXXVII)

The 1921 Covenant stipulated that the Federal Government should administer the national finances, which should be distinct from those of the component States, and that the component States should "continue the administration of their present internal and external debts" (art. V, para. (*m*)). It then went on to provide that:

The Federal Government shall be under an obligation to see that the said administration is faithfully carried out, and that the revenues pledged thereto are earmarked for that purpose.

(6) As indicated above, it is usually through the internal laws of States that questions relating to State debts have been regulated. Such laws often provide for the internal allocation of the State debt and thus are not directly relevant to the present article. Some examples, however, may be mentioned, because they assume that the State debt of the predecessor State passes to the successor State; otherwise no question of its allocation among component parts would arise.

(7) The union of Austria and Hungary was based essentially on two instruments: the "[Austrian] Act concerning matters of common interest to all the countries of the Austrian Monarchy and the manner of dealing with them", of 21 December 1867, and the "Hungarian Act [No. 12] relating to matters of common interest to the countries of the Hungarian Crown and the other countries subject to the sovereignty of His Majesty and the manner of dealing with them", of 12 June 1867.[479] The Austrian Act provided, in article 4, that

The contribution to the costs of the pre-existing public debt shall be determined by agreement between the two halves of the Empire.

The Hungarian Act No. 12 of 1867 contained the following:

Article 53. As regards public debts, Hungary, by virtue of its constitutional status, cannot, in strict law, be obliged to assume debts contracted without the legally expressed consent of the country.

Article 54. However, the present Diet has already declared "that, if a genuine constitutional regime is really applied as soon as possible in our country and also in His Majesty's other countries, it is prepared, for considerations of equity and on political grounds, to go beyond its legitimate obligations and to do whatever shall be compatible with the independence and the constitutional rights of the country to the end that His Majesty's other countries, and Hungary with them, may not be ruined by the weight of the expenses accumulated under the regime of absolute power and that the untoward consequences of the tragic period which has just elapsed may be averted".

Article 55. For this reason, and for this reason alone, Hungary is prepared to assume a portion of the public debts and to conclude an agreement to that effect, after prior negotiations, with His Majesty's other countries, as a free people with a free people.

(8) The Constitution of the Federation of Malaya (1957)[480] contained a long article 167 entitled "Rights, liabilities and obligations", which included the following provisions:

(1) . . . all rights, liabilities and obligations of

(*a*) Her Majesty in respect of the Government of the Federation, and

(*b*) the Government of the Federation or any public officer on behalf of the Government of the Federation,

shall on and after Merdeka Day [the date of uniting] be the rights, liabilities and obligations of the Federation.

(2) . . . all rights, liabilities and obligations of

(*a*) Her Majesty in respect of the government of Malacca or the government of Penang,

(*b*) His Highness the Ruler in respect of the government of any State, and

(*c*) the government of any State,

shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States.

These provisions thus appear to indicate that each State entity was concerned only with the assets and liabilities of its particular sphere. "Rights, liabilities and obligations" were apportioned according to the division of spheres of competence established between the Federation and the member States. Debts contracted were thus the responsibility of the States in respect of matters which, as from the date of uniting, fell within their respective spheres of competence. Article 167 continued:

(3) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Federation Government but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State.

(4) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Government of a State but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation.

(9) The Federation of Malaya was succeeded by Malaysia in 1963. The Malaysia Bill, which was annexed to

[477] English trans. in Parry, *op. cit.*, vol. 185, pp. 239 *et seq.*, and *British and Foreign State Papers, 1899-1900* (London, Harrison, 1903), vol. XCII, pp. 234 *et seq.*

[478] League of Nations, *Treaty Series*, vol. V, p. 9.

[479] F. R. Dareste et P. Dareste, *Les constitutions modernes*, 3rd ed. (Paris, Challamel, 1910), vol. I, pp. 394 *et seq.* (for the Austrian Act) and pp. 403 *et seq.* (for the Hungarian Act).

[480] *Malayan Constitutional Documents* (Kuala Lumpur, Government Printer, 1959), p. 27.

the Agreement relating to Malaysia and came into force on 16 September 1963, contained in its part IV, relating to transitional and temporary provisions, a section 76 entitled "Succession to rights, liabilities and obligations", which read, *inter alia*:

(1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.

(2) This section does not apply to any rights, liabilities or obligations in relation to which section 75 has effect, nor does it have effect to transfer any person from service under the State to service under the Federation or otherwise affect any rights, liabilities or obligations arising from such service or from any contract of employment; but, subject to that, in this section rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise.

. . .

(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day.[481]

Similar provisions may be noted in the individual Constitutions of the member States of the Federation. For example, article 50 of the Constitution of the State of Sabah (Rights, liabilities and obligations) stated:

(1) All rights, liabilities and obligations of Her Majesty in respect of the government of the colony of North Borneo shall on the commencement of this Constitution become rights, liabilities and obligations of the State.[482]

(10) The Provisional Constitution of the United Arab Republic, of 5 March 1958,[483] although not very explicit as regards succession to debts of the two predecessor States, Egypt and Syria, provided in article 29 that:

The Government may not contract any loans, or undertake any project which would be a burden on the State Treasury over one or more future years, except with the consent of the National Assembly.

This provision may be interpreted as giving the legislative authority of the United Arab Republic, to the exclusion of Syria and Egypt, sole power to contract loans. Furthermore, since article 70 provided for a single budget for the two regions, there may be grounds for agreeing with an eminent authority that "the United Arab Republic would seem to have been the only entity competent to service the debts of the two regions".[484]

Article 38. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account all relevant circumstances.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

Article 39. Dissolution of a State

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account all relevant circumstances.

Commentary to articles 38 and 39

(1) The topics of succession of States covered by articles 38 and 39 correspond to those dealt with in articles 16 and 17 and 28 and 29, respectively in parts II and III; hence the use of similar introductory phrases in the corresponding articles to define their scope. Articles 38 and 39 both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. They differ, however, in that, while under article 38 the predecessor State continues its existence, under article 39 it ceases to exist after the separation of parts of its territory. The latter case is referred to as "dissolution of a State" in articles 17, 29 and 39.[485]

(2) In establishing the rule for articles 38 and 39 the Commission believes that, unless there is a compelling reason to the contrary, the passing of the State debt in the two types of succession covered by these articles should be governed by a common basic rule, as are articles 16 and 17, relating to State property and articles 28 and 29 on State archives. It is on the basis of this assumption that State practice and legal doctrine will be examined in the following paragraphs.

(3) The practice of States offers few examples of separation of part or parts of the territory. Some cases may nevertheless be mentioned, one of them being the establishment of the Irish Free State. By the Treaty of 6 December 1921, Ireland obtained from the United Kingdom the status of a Dominion and became the Irish Free State. The Treaty apportioned debts between the predecessor State and the successor State on the following terms:

The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.[486]

(4) Another example is the separation of Singapore, which, after joining the Federation of Malaya in 1963, withdrew from it and achieved independence in 1965.

[481] United Nations, *Treaty Series*, vol. 750, p. 60.

[482] *Ibid.*, p. 110. See also the Constitution of the State of Sarawak, art. 48 (*ibid.*, p. 134) and the Constitution of the State of Singapore, art. 104 (*ibid.*, p. 176).

[483] Text in E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly* (London), vol. 8, part 2 (April 1959), pp. 374-387.

[484] O'Connell, *State Succession . . . (op. cit.)*, p. 386. It may be noted that the arrears of contributions due to UNESCO from Egypt and Syria before their union came into being were treated as a liability of the United Arab Republic (*Materials on Succession of States in respect of Matters other than Treaties* (United Nations publication, Sales No. E/F.77.V.9), p. 545).

[485] See above, para. (1) of the commentary to arts. 16 and 17.

[486] Art. V of the Treaty of 6 December 1921 between Great Britain and Ireland (League of Nations, *Treaty Series*, vol. XXVI, p. 10).

Article VIII of the Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State, signed at Kuala Lumpur on 7 August 1965, provides:

> With regard to any agreement entered into between the Government of Singapore and any other country or corporate body which has been guaranteed by the Government of Malaysia, the Government of Singapore hereby undertakes to negotiate with such country or corporate body to enter into a fresh agreement releasing the Government of Malaysia of its liabilities and obligations under the said guarantee, and the Government of Singapore hereby undertakes to indemnify the Government of Malaysia fully for any liabilities, obligations or damage which it may suffer as a result of the said guarantee.[487]

(5) The two above-mentioned examples relate to cases where separation took place by agreement between the predecessor and successor States. However, it is far from certain that separation is always achieved by agreement. For example, the apportionment of State debts between Bangladesh and Pakistan does not seem to have been settled since the failure of the negotiations held at Dacca from 27 to 29 June 1974.[488] This is one of the points that clearly distinguish cases of separation, covered by article 38, from cases of transfer of a part of a State's territory, dealt with in article 35. The latter article, it should be recalled, concerns the transfer of relatively small or unimportant territories, effected by theoretically peaceful procedures and, in principle, by agreement between the ceding and beneficiary States.

(6) With regard to dissolution of a State, covered by article 39, the following historical precedents may be cited: the dissolution of Great Colombia (1829-1831), the dissolution of the Union of Norway and Sweden (1905), the disappearance of the Austro-Hungarian Empire (1919), the disappearance of the Federation of Mali (1960), the dissolution of the United Arab Republic (1961) and the dissolution of the Federation of Rhodesia-Nyasaland (1963). Some of these cases are considered below, with a view to establishing how the parties concerned attempted to settle the passing of State debts.

(7) Great Colombia, which was formed in 1821 by the Union of New Granada, Venezuela and Ecuador, was not to be long-lived. Within about ten years, internal disputes had put an end to the union, whose dissolution was fully consummated in1831.[489] The successor States agreed to assume responsibility for the debts of the Union. New Granada and Ecuador first established the principle in the Treaty of Peace and Friendship concluded at Pasto on 8 December 1832. Article VII of the Treaty provided:

> It has been agreed, and is hereby agreed, in the most solemn manner, and under the Regulations of the Laws of both States, that New Granada and Ecuador shall pay such share of the Debts, Domestic and Foreign, as may proportionably belong to them as integral parts which they formed, of the Republic of Colombia, which Republic recognized the said debts *in solidum*. Moreover, each State agrees to answer for the amount of which it may have disposed belonging to the said Republic.[490]

Reference may also be made to the Convention of Bogota of 23 December 1834, concluded between New Granada and Venezuela, to which Ecuador subsequently acceded on 17 April 1857.[491] These two instruments indicate that the successor States were to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50 per cent; Venezuela, 28.5 per cent; Ecuador, 21.5 per cent.[492]

(8) The "Belgian-Dutch question" of 1830 had necessitated the intervention of the five Powers of the Holy Alliance, in the form of a conference that opened in London in 1830 and that culminated only in 1839, in the Treaty of London of 19 April of that year.[493] During the nine years of negotiations, a number of documents had to be prepared before the claims regarding the debts of the Kingdom of the Netherlands could be settled.

(9) One such document, the Twelfth Protocol of the London Conference, dated 27 January 1831, prepared by the five Powers, was the first to propose a fairly specific mode of settlement of the debts, which was to be included among the general principles to be applied in the draft treaty of London. The five Powers first sought to justify their intervention by asserting that "experience . . . had only too often demonstrated to them the complete impossibility of the Parties directly concerned agreeing on such matters, if the benevolent solicitude of the five Courts did not facilitate agreement".[494] They cited the existence of relevant precedents that they had helped to establish and that had "in the past led to decisions based on principles which, far from being new, were those that have always governed the reciprocal relations of States, and that have been cited and confirmed in special agreements concluded between the five Courts. Those agreements cannot therefore be changed in any case without the participation of the Contracting Powers."[495] One of the

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[487] United Nations, *Treaty Series*, vol. 563, p. 94.

The Constitution of Malaysia (Singapore Amendment) Act, 1965, also contains some provisions relating to "succession to liabilities and obligations", including the following paragraph:

> "9. All property, movable and immovable, and rights, liabilities and obligations which before Malaysia Day belonged to or were the responsibility of the Government of Singapore and which on that day or after became the property of or the responsibility of the Government of Malaysia shall on Singapore Day revert to and vest in or devolve upon and become once again the property of or the responsibility of Singapore." (*Ibid.*, p. 100.)

[488] Rousseau, *Droit international public (op. cit.)*, p. 454. According to the same author, "Bangladesh claimed 56 per cent of all common property, while at the same time remaining very reticent regarding the apportionment of existing debts—a problem that it apparently did not wish to tackle until after settlement of the apportionment of assets, an approach that Pakistan is said to have refused." (*Ibid.*)

[489] See V. L. Tapié, *Histoire de l'Amérique latine au XIX^e siècle* (Paris, Montaigne, 1945). See in particular the discussion of the breakup of Great Colombia, pp. 57-60.

[490] Spanish text and English trans. in Parry, *op. cit.*, vol. 83, p. 115, and *British and Foreign State Papers, 1832-1833* (London, Ridgway, 1836), vol. XX, p. 1209.

[491] Convention for the acknowledgement and division of the active and passive credits of Colombia (*ibid., 1834-1835* (1852), vol. XXIII, p. 1342). See also Feilchenfeld, *op. cit.*, pp. 296-298 (especially p. 296, where the pertinent articles of the Convention are quoted).

[492] Sánchez de Bustamante y Sirvén, *op. cit.*, p. 319; Accioly, *op. cit.*, p. 199; O'Connell, *State Succession... (op. cit.)*, p. 388.

[493] Treaty of London between the five Powers (Austria, France, Great Britain, Prussia and Russia) and Belgium: *British and Foreign State Papers, 1838-1839* (London, Harrison, 1856), vol. XXVII, p. 990, and the Netherlands: *ibid.*, p. 1000.

[494] *Ibid., 1830-1831* (London, Ridgway, 1833), vol. XVIII, p. 761.

[495] *Ibid.*

leading precedents relied upon by these five monarchies was apparently the above-mentioned Act of 21 July 1814[496] by which Belgium and the Netherlands had been united. Article VI of that Act provided that:

> Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other shall be borne by the General Treasury of the Netherlands.

From that provision the five Powers drew the conclusion of principle that, "upon the termination of the union, the community in question likewise should probably come to an end, and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might under the system of separation, be redivided".[497] Applying that principle in the case of the Netherlands, the five Powers concluded that "each country should first reassume exclusively responsibility for the debts it owed before the union" and that Belgium should in addition assume "*in fair proportion*, the debts contracted since the date of the said union, and during the period of the union, by the General Treasury of the Kingdom of the Netherlands, as they are shown in the budget of that Kingdom".[498] That conclusion was incorporated in the "Bases for establishing the separation of Belgium and Holland" annexed to the Twelfth Protocol. Articles X and XI of those "bases" read as follows:

> *Article X.* The debts of the Kingdom of the Netherlands for which the Royal Treasury is at present liable, namely: (1) the outstanding debt on which interest is payable; (2) the deferred debt; (3) the various bonds of the Amortization Syndicate; (4) the reimbursable annuity funds secured on State lands by special mortgages: shall be apportioned between Holland and Belgium in proportion to the average share of the direct, indirect and excise taxes of the Kingdom paid by each of the two countries during the years 1827, 1828 and 1829.
>
> *Article XI.* Inasmuch as the average share in question makes Holland liable for 15/31 and Belgium liable for 16/31 of the aforesaid debts, it is understood that Belgium will continue to be liable for the payment of appropriate interest.[499]

These provisions were objected to by France, which considered that "His Majesty's Government had not found their bases equitable enough to be acceptable".[500] The four courts to which the French communication was addressed replied that:

> The principle established in Protocol No. 12, with regard to the debt, was as follows: When the Kingdom of the Netherlands was formed by the union of Holland with Belgium, the then existing debts of those two countries were merged by the Treaty of 1815 into a single whole and declared to be the national debt of the United Kingdom. It is therefore necessary and just that, when Holland and Belgium separate, each should resume responsibility for the debt for which it was responsible before their union, and that these debts which were united at the same time as the two countries, should likewise be separated.
>
> Subsequent to the union, the United Kingdom has contracted an additional debt which, upon the separation of the United Kingdom, must be *fairly* apportioned between the two States; the Protocol does not, however, specify what exactly the fair proportion should be, and leaves this question to be settled later.[501]

(10) The Netherlands proved particularly satisfied and its plenipotentiaries were authorized to indicate their full and complete acceptance of all the basic articles designed to establish the separation of Belgium and Holland, which basic provisions derived from the Eleventh and Twelfth London Protocols of 20 and 27 January 1831.[502] The Belgian point of view was reflected in a report dated 15 March 1831 to the Regent by the Belgian Minister for Foreign Affairs, which stated:

> Protocols Nos. 12 and 13 dated 27 January . . . have shown in the most obvious manner the partiality, no doubt involuntary, of some of the plenipotentiaries in the Conference. These Protocols, dealing with the fixing of the boundaries, the armistice and, above all, the apportionment of the debts, arrangements which would consummate the ruin of Belgium, were restored . . . by a note of 22 February, the last act of the Diplomatic Committee.[503]

Belgium thus rejected the provisions of the "Bases designed to establish the separation of Belgium and Holland". More precisely, it made its acceptance dependent on the facilities to be accorded it by the Powers in the acquisition, against payment, of the Grand Duchy of Luxembourg.

(11) The Twenty-fourth Protocol of the London Conference, dated 21 May 1831, clearly stated that "acceptance by the Belgian Congress of the bases for the separation of Belgium from Holland would be very largely facilitated if the five Courts consented to support Belgium in its wish to obtain against payment, the Grand Duchy of Luxembourg".[504] As its wish could not be satisfied, Belgium refused to agree to the debt apportionment proposals which had been made to it. The Powers thereupon took it upon themselves to devise another formula for the apportionment of the debts; that was the object of the Twenty-sixth Protocol, of the London Conference, dated 26 June 1831. The new protocol contained a draft treaty consisting of 18 articles, article XII of which stated:

> The debts shall be apportioned in such a way that each of the two countries shall be liable for all the debts which originally, before the union, encumbered the territories composing them, and so that debts which were jointly contracted shall be divided up in a just proportion.[505]

That was in fact only a reaffirmation, not specified in figures, of the principle of the apportionment of debts contained in the Twelfth Protocol. Unlike the latter, however, the new protocol did not specify the debts for which the parties were liable. This time it was the

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[496] See above, para. (3) of the commentary to art. 37 and footnote 472.

[497] *British and Foreign State Papers, 1830-1831 (op. cit.)*, vol. XVIII, p. 762.

[498] *Ibid.*, pp. 766-768.

[499] *Ibid.*, p. 767.

[500] Twentieth Protocol of the London Conference, dated 17 March 1831 (annex A): Communication to the Conference by the plenipotentiary of France, Paris, 1 March 1831 (*ibid.*, p. 786).

[501] *Idem* (annex B): Reply of the plenipotentiaries of the four Courts to the plenipotentiary of France (*ibid.*, p. 788).

[502] Eleventh Protocol of the London Conference, dated 20 January 1831, determining the boundaries of Holland (*ibid.*, p. 759) and Twelfth Protocol, dated 27 January 1831 (*ibid.*, p. 761).

[503] G. F. de Martens, ed., *Nouveau Recueil des Traités*, vol. X (*op. cit.*), p. 222.

[504] *British and Foreign State Papers, 1830-1831 (op. cit.)*, vol. XVIII, p. 798.

[505] *Ibid.*, pp. 804-805.

Kingdom of the Netherlands that rejected the proposals of the Conference,[506] and Belgium that agreed to them.[507]

(12) Before the Conference adjourned on 1 October 1832, it made several unsuccessful proposals and counter-proposals.[508] Not until seven years later did the Belgian-Netherlands Treaty of 9 April 1839 devise a solution to the problem of the succession to debts arising out of the separation of Belgium and Holland.

(13) The Belgian-Dutch dispute concerning succession to the State debts of the Netherlands was finally settled by the Treaty of London of 19 April 1839, article XIII of the annex to which contained the following provisions:

1. As from 1 January 1839, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 5 million Netherlands florins, in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger, or of the ledger of the General Treasury of the Kingdom of the Netherlands, to the debit side of the ledger of Belgium.

2. The principal transferred, and the annuity bonds entered on the debit side of the ledger of Belgium, in accordance with the preceding paragraph, up to a total of 5 million Netherlands florins, in annuity payments, shall be considered as part of the Belgian national debt; and Belgium undertakes not to allow, either now or in future, any distinction to be made between the portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt.

. . .

4. By the creation of the said sum of 5 million florins of annuities, Belgium shall be discharged vis-à-vis Holland of any obligation resulting from the apportionment of the public debts of the Kingdom of the Netherlands.[509]

The five Powers of the Holy Alliance, under whose auspices the 1839 Treaty was signed, guaranteed its provisions in two conventions of the same date signed by them and by Belgium and Holland. It was stated in those instruments that the articles of the Belgian-Dutch Treaty "are deemed to have the same force and value as they would have if they had been included textually in the present instrument, and are consequently placed under the guarantee of Their Majesties".[510]

(14) The dissolution of the Union of Norway and Sweden was effected by several conventions signed at Stockholm on 26 October 1905.[511] The treatment of debts was decided by the Agreement of 23 March 1906 relating to the settlement of economic questions arising in connection with the dissolution of the union between Norway and Sweden,[512] which is commonly interpreted to mean that each State continued to be liable for its debts.[513] The Agreement provided:

Article 1. Norway shall pay to Sweden the share applicable to the first half of 1905 of the appropriations voted by Norway out of the common budget for the foreign relations of Sweden and Norway in respect of that year, into the Cabinet Fund, and also, out of the appropriations voted by Norway for contingent and unforeseen expenditures of the Cabinet Fund for the same year, the share attributable to Norway of the cost-of-living allowances paid to the agents and officials of the Ministry of Foreign Relations for the first half of 1905.

Article 2. Norway shall pay to Sweden the share applicable to the period 1 January-31 October 1905 of the appropriations voted by Norway out of the common budget for that year, into the Consulates Fund, and also the share attributable to Norway of the following expenditures incurred in 1904 and not accounted for in the appropriations for that year:

(*a*) the actual service expenditures of the consulates for the whole of 1904; and

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[506] See Twenty-eighth Protocol of the London Conference, dated 25 July 1831 (annex A): "The Netherlands Government to the Conference", The Hague, 12 July 1831 (*ibid.*, pp. 808 *et seq.*, and particularly pp. 811-812).

[507] See Twenty-seventh Protocol of the London Conference, dated 12 July 1831 (annex A): "The Belgian Government to the Conference", Brussels, 9 July 1831 (*ibid.*, p. 806).

[508] These proposals and counter-proposals included those made in two protocols and a treaty:

(*a*) The Forty-fourth Protocol of the London Conference, dated 26 September 1831 (annex A) Proposals by the London Conference, part 3 of which comprised 12 articles (arts. VII-XVIII), of which the first three concerned debts:

"VII. Belgium, including the Grand Duchy of Luxembourg, shall be liable for the debts which it had lawfully contracted before the establishment of the Kingdom of the Netherlands.

"Debts lawfully contracted from the time of the establishment of the Kingdom until 1 October 1830 shall be equally apportioned.

"VIII. Expenditures by the Treasury of the Netherlands for special items which remain the property of one of the two Contracting Parties shall be charged to it, and the amount shall be deducted from the debt allocated to the other Party.

"IX. The expenditures referred to in the preceding article include the amortization of the debt, both oustanding and deferred, in the proportion of the original debts, in accordance with article VII." (*Ibid.*, pp. 867-868.)

These proposals, which were the subject of strong criticism by both the States concerned, were not adopted.

(*b*) The Forty-ninth Protocol of the London Conference, dated 14 October 1831 (annex A), Articles for the separation of Belgium from Holland, of which the first two paragraphs of a long article XIII read as follows:

"1. As from 1 January 1832, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 8,400,000 Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

"2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 8,400,000 Netherlands florins of annuity bonds, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow either now or in future, any distinction to be made between this portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt." (*Ibid.*, pp. 897-898.)

Belgium agreed to this provision.

(*c*) The treaty for the final separation of Belgium from Holland, signed at London by the five Courts and by Belgium on 15 November 1831 (*ibid.*, pp. 645 *et seq.*), used the wording of provisions of the Forty-ninth Protocol reproduced above. This time too, however, it was not accepted by Holland (see Fifty-third Protocol of the London Conference, dated 4 January 1832, annex A (*ibid.*, 1831-1832 (London, Ridgway, 1834), vol. XIX, pp. 57-62)).

[509] *British and Foreign State Papers, 1838-1839* (*op. cit.*), vol. XXVII, p. 997.

[510] Art. II of the London Treaty of 19 April 1839, signed by the five Courts and the Netherlands (*ibid.*, p. 991), and art. I of the London Treaty of the same date, signed by the Five Courts and Belgium (*ibid.*, p. 1001).

[511] See L. Jordan, *La séparation de la Suède et de la Norvège* (Paris, Pedone, 1906) [thesis]; Fauchille, *op. cit.*, p. 234. Texts in Parry, *op. cit.*, vol. 199, pp. 279 *et seq.*

[512] E. Descamps et L. Renault, *Recueil international des traités du XX^e siècle, année 1906* (Paris, Rousseau [n.d.]), pp. 858-862.

[513] Thus Fauchille (*op. cit.*, p. 389) writes:

"After Sweden and Norway had dissolved their real union in 1905, a convention between the two countries, dated 23 March 1906, left each of them responsible for its personal debts."

(*b*) the office expenses actually attributed to the remunerated consulates, subject to production of documentary evidence, for the second half of 1904.[514]

These provisions, the purpose of which was to make Norway assume its share of common budget expenditures, become clearer if it is remembered that, by a duplication of functions, the King of Sweden was also the King of Norway, and that the Swedish institutions were exclusively responsible for the diplomatic and consular representation of the Union. In this connection, it should be noted that the cause of the break between the two States was Norway's wish to have its own consular service.[515] From the foregoing considerations, it may be inferred that the consequences of the dissolution of the Swedish-Norwegian Union were, first, the continued liability of each of the two States for its own debts and, secondly, an apportionment of the common debts between the two successor States.

(15) The Federation of which Northern Rhodesia, Southern Rhodesia and Nyasaland had been members since 1953 was dissolved in 1963 by an Order in Council of the United Kingdom Government. The Order also apportioned the federal debt among the three territories in the following proportions: Southern Rhodesia, 52 per cent; Northern Rhodesia, 37 per cent; Nyasaland, 11 per cent. The apportionment was made on the basis of the share of the federal income allocated to each territory.[516] This apportionment of the debts, as made by the United Kingdom Government's Order in Council, was challenged both as to its principle and as to its procedure. It was first pointed out that, "since the dissolution was an exercise of Britain's sovereign power, Britain should assume responsibility".[517] This observation was all the more pertinent as the debts thus apportioned among the successor States by a British act of authority included debts contracted, under the administering Power's guarantee, with IBRD. This explains the statement by Northern Rhodesia that "it had at no time agreed to the allocation laid down in the Order, and had only reluctantly acquiesced in the settlement".[518] Zambia, formerly Northern Rhodesia, later dropped its claim because of the aid granted to it by the United Kingdom Government, according to one writer.[519]

(16) One of the cases considered above, the dissolution of Great Colombia, gave rise to two arbitral awards almost fifty years after the apportionment among the successor States of the debts of the predecessor State. These were the *Sarah Campbell* and *W. Ackers-Cage* cases,[520] taken up by the Mixed Commission of Caracas set up between Great Britain and Venezuela under an agreement of 21 September 1868, in which two claimants—Alexander Campbell (later, his widow Sarah Campbell) and W. Ackers-Cage—sought to obtain from Venezuela payment of a debt owing to them by Great Colombia. Umpire G. Sturup, in his award of 1 October 1869, held that "the two claims should be paid by the Republic. However, since they both form part of the country's external debt, it would be unjust to require that they be paid in full."[521]

(17) Two authors who commented on this award considered that "the responsibility of Venezuela for the debts of the former Republic of Colombia, from which it had originated, was not and could not be contested" because, in their opinion (citing Bonfils and Fauchille), it could be regarded as a rule of international law that "where a State ceases to exist by breaking up or dividing into several new States, the new States should each bear, in an equitable proportion, a share of the debts of the original State as a whole".[522] Another author took the same view, adding pertinently that "the umpire Sturup simply took account of the resources of the successor State in imposing an equitable reduction of the amount of the claims".[523]

(18) In connection with the dissolution of a State in general, the following rule has been suggested:

> If a State ceases to exist by breaking up and dividing into several new States, each of the latter shall in equitable proportion assume responsibility for a share of the debts of the original State as a whole, and each of them shall also assume exclusive responsibility for the debts contracted in the exclusive interest of its territory.[524]

(19) A comparable formula is offered by an authority on the subject, article 49 of whose codification of international law provides that:

> If a State should divide into two or more new States, none of which is to be considered as the continuation of the former State, that former State is deemed to have ceased to exist and the new States replace it with the status of new persons.[525]

He, too, recommends the equitable apportionment of the debts of the extinct predecessor State, citing as an example "the division of the Netherlands into two kingdoms: Holland and Belgium", although he considers that "the former Netherlands was in a way continued by Holland particularly as regards the colonies".[526]

(20) From the foregoing survey, two conclusions may be drawn that are worth noting in the context of articles 38 and 39. The first relates to the classification of the category of State succession exemplified by the precedents cited. In choosing historical examples of the practice of States with a view to their classification as cases of separation-secession and dissolution respectively, the Commission has mainly taken into account the fact that in a case of the first category the predecessor State survives the transfer of territory, whereas in a case of the second category it ceases to exist. In the first case, the problem of the apportionment of debts arises between a predecessor State and one or more successor States, whereas in the second it affects successor States *inter se*. Yet even this apparently very dependable criterion of the State's disappearance or survival cannot

[514] Descamps and Renault, *op. cit.*, pp. 858-859.
[515] Académie diplomatique internationale, *Dictionnaire diplomatique*, ed. A. F. Frangulis (Paris, Lang Blanchong, 1933), vol. II, p. 233.
[516] O'Connell, *State Succession . . . (op. cit.)*, p. 393.
[517] *Ibid.*, p. 394.
[518] *Ibid.*, p. 393.
[519] *Ibid.*, footnote 6.
[520] Lapradelle and Politis, *Recueil des arbitrages internationaux (op. cit.)*, vol. II, pp. 552-556.
[521] *Ibid.*, pp. 554-555.
[522] *Ibid.*, p. 555.
[523] Rousseau, *Droit international public (op. cit.)*, p. 431.
[524] Fauchille, *op. cit.*, p. 380.
[525] J. G. Bluntschli, *Das moderne Völkerrecht*, 3rd ed. (Nördlingen, Beck, 1878), pp. 81-82.
[526] *Ibid.*

ultimately provide sure guidance, for it raises, in particular, the thorny problems of the State's continuity and identity.

(21) In the case of the disappearance of the Kingdom of the Netherlands in 1830, which the Commission has considered, not without some hesitation, as one of the examples of dissolution of a State, the predecessor State—the Belgian-Dutch monarchical entity—seems genuinely to have disappeared and to have been replaced by two new successor States, Belgium and Holland, each of which assumed responsibility for one half of the debts of the predecessor State. It might be said that it was actually the mode of settlement of the apportionment of the debts that confirmed the nature of the event that had occurred in the Dutch monarchy and made it possible to describe it as "dissolution of a State". It is also possible, on the other hand, to regard the Netherlands example as a case of secession, and to hold, like one of the authors cited above, that "from a legal point of view, the independence of Belgium was nothing more than a secession of a province".[527] That approach might have proved seriously prejudicial to Holland's interests had it been acted upon, precisely in so far as it was not apparently demonstrated that the secessionist province was legally bound to participate —let alone in equal proportion—in servicing the debt of the dismembered State. But that approach was not, in fact, adopted by the London Conference, or even by the parties themselves, least of all by Belgium. Both States regarded their separation as the dissolution of a union, and each claimed for itself the title of successor State to a predecessor State that had ceased to exist. That was the treatment adopted in the above-mentioned Treaty of London of 19 April 1839 concluded between the five Powers and the Netherlands, article III of which provided that:

> *The union** which existed between Holland and Belgium, under the Treaty of Vienna of 31 May 1815, is recognized by His Majesty the King of the Netherlands, Grand Duke of Luxembourg, as being *dissolved**.[528]

(22) There are other cases concerning which opinions differ as to whether they should be regarded as falling under article 38 or under article 39. In any event, it is clear that there is a relationship between the two types of succession, and that the solutions adopted in the two cases should at least be analogous.

(23) The second conclusion concerns the nature of the problems arising in connection with succession of States in respect of debts. In cases of separation of a part of the territory of a State as well as of dissolution of a State, the problems posed by the devolution of the State debt involve, in the final analysis, an endeavour to adjust the interests of the States concerned. Such interests are often substantial and almost always conflicting, and their reconciliation will in many cases call for difficult negotiations between the States directly affected by the succession. Only these States really know what are their own interests, and are often the best qualified to defend them, and in any event they alone know how far they can go in making concessions. These considerations are most strikingly illustrated in the already quoted case of 1830/1839, where the Netherlands and Belgium refused to submit to the many settlement proposals made by third States, which happened to be the major Powers at that time. The solution was worked out by the States concerned themselves, although a certain kinship is discernible between the various types of settlement proposed to them and the solutions they ultimately adopted. While it is undeniably more than desirable—indeed, necessary—to leave the parties concerned the widest latitude in seeking an agreement acceptable to each of them, nevertheless this "face-to-face" confrontation might in some situation prove prejudicial to the interests of the weaker party.

(24) In the light of the foregoing remarks, the best solution in the two types of succession envisaged under articles 38 and 39 would be to adopt a common residual rule to be applied in cases where the States concerned cannot reach agreement on the devolution of the debt of the predecessor State. Furthermore, the historical precedents analysed above, together with the theoretical considerations amply developed throughout the present draft articles, lead the Commission to conclude that such a rule should be based on equity.

(25) *Paragraph 1 of article 38* as well as *article 39* thus state that, unless the States concerned otherwise agree "the State debt of the predecessor State" shall pass to the successor State or States, "in [an] equitable proportion[s], taking into account all relevant circumstances". The States concerned are "the predecessor State and the successor State" in the case of article 38, and "the successor States" in the case of article 39, where the predecessor State disappears. It should be noted that in article 39 the Commission has omitted the word "concerned", which appears after the words "the successor States" in article 17, because of the different situation covered by article 39, which involves the passing of a debt rather than of property. Such debt cannot be imposed on one of the successor States by agreement between the other successor States alone.

(26) Regarding the phrase "unless . . . otherwise agree", the Commission wishes to point out that it is by no means intended to imply that the parties may agree on a solution that is not equitable. As demonstrated by State practice, an equitable or "just" apportionment of debts should always be the guiding principle for negotiations.

(27) With regard to the expression "taking into account all relevant circumstances" used in articles 38 and 39, the Commission adopted that formula despite the fact that it did not conform to the one already used in article 35, paragraph 2, namely, "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt". Although the latter phrase could theoretically be considered as including "all relevant circumstances", the Commission preferred the new expression for articles 38 and 39 in order to avoid a division of opinion among its members as to whether those articles should expressly mention, as one of the factors to be taken into account, the "tax-paying capacity" or "debt-servicing

[527] Feilchenfeld, *op. cit.*, p. 208.

[528] *British and Foreign State Papers, 1838-1839 (op. cit.)*, vol. XXVII, p. 992.

capacity", which would best convey the meaning of the French term *"capacité contributive"*. Some members considered such capacity as one of the most important factors in dealing with the passing of State debts. Others took the view that it should nowhere be mentioned because, if that factor were to be singled out, there might be a danger of excluding others that could be equally important. In addition, the term *"capacité contributive"* was thought to be too vague to be uniformly interpreted. The expression "taking into account all relevant circumstances" should therefore be understood to embrace all the factors relevant to a given situation, including *"capacité contributive"*, both actual and potential, and the "property, rights and interests" passing to the successor State in relation to the State debt in question. Other factors, too, might deserve particular consideration in certain cases, their relative importance varying according to the specific situation.

(28) *Paragraph 2 of article 38* is identical with paragraph 2 of article 16, the purpose of which is to assimilate cases of separation of a part of the territory of a State that unites with another independent State, to those in which a part of the territory of a State separates and forms a new State. The rationale for such assimilation is given in the commentary to article 16 in the context of succession in respect of State property.[329] The Commission finds no reason to deal with such cases differently in the context of succession to State debts.

[329] See above, para. (16) of the commentary to arts. 16 and 17.

C. REPORT OF THE COMMITTEE OF THE WHOLE

Documents A/CONF.117/11 and Add.1 to 12

[Original: English]
[1, 4, 5 and 6 April 1983]

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[BACKGROUND NOTE

By its resolution 36/113 of 10 December 1981, the General Assembly decided to convene a conference of plenipotentiaries in 1983 to consider the draft articles on succession of States in respect of State property, archives and debts, adopted by the International Law Commission at its thirty-third session, and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. Subsequently, by its resolution 37/11 of 15 November 1982, the General Assembly decided that the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts would be held from 1 March to 8 April 1983 at Vienna.]

Chapter I

INTRODUCTION

A. Opening of the Conference and election of officers

1. The Conference opened on 1 March 1983 at the Neue Hofburg, Vienna. At its 1st plenary meeting, held on 1 March 1983, the Conference, *inter alia*, established a single Committee of the Whole to which it referred item 11 of the agenda adopted by the Conference (A/CONF.117/7), namely "Consideration of the question of succession of States in respect of State property, archives and debts, in accordance with General Assembly resolutions 36/113 of 10 December 1981 and 37/11 of 15 November 1982". The present document contains the report of the Committee of the Whole to the Conference on its consideration of that item.

2. At its 2nd plenary meeting, held on 1 March 1983, the Conference elected by acclamation Mr. Milan Šahović (Yugoslavia) to be Chairman of the Committee of the Whole.

3. At its 1st meeting, held on 2 March 1983, the Committee of the Whole elected by acclamation Mr. Moncef Benouniche (Algeria) as Vice-Chairman and Mrs. Kuljit Thakore (India) as Rapporteur.

4. The Secretariat was composed as follows: Representative of the Secretary-General of the United Nations, Under-Secretary-General, The Legal Counsel, Mr. Carl-August Fleischhauer; Executive Secretary of the Conference, Director of the Codification Division of the Office of Legal Affairs of the United Nations, Mr. Valentin A. Romanov; Secretaries of the Committee of the Whole, Miss Jacqueline Dauchy and Mr. E. Valencia-Ospina; Assistant Secretaries of the Committee of the Whole, Mr. A. O. Adede, Mr. Larry D. Johnson and Mr. S. Shestakov; Secretary of the Drafting Committee, Mr. E. Valencia-Ospina; Assistant Secretary of the Drafting Committee, Mr. Larry D. Johnson.

B. Basic proposal

5. In accordance with rule 27 of the rules of procedure (A/CONF.117/8) adopted by the Conference at its 1st plenary meeting, held on 1 March 1983, the Committee of the Whole had before it, as the basic proposal for discussion by the Conference, the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission at its thirty-third session (A/CONF.117/4).[1]

6. The Committee of the Whole, in addition to the relevant records of the International Law Commission and of the General Assembly, had available to it the following background documentation:

(*a*) An analytical compilation of comments of Governments on the final draft articles on succession of

[1] See sect. B of this volume.

States in respect of State property, archives and debts (A/CONF.117/5 and Add.1) prepared by the Codification Division, Office of Legal Affairs of the United Nations Secretariat;

(*b*) A guide for the draft articles on succession of States in respect of State property, archives and debts (ST/LEG/14), prepared by the Codification Division, Office of Legal Affairs of the United Nations Secretariat;

(*c*) Written comments and observations submitted by Governments pursuant to resolution 36/113, report of the Secretary-General (A/37/454 and Corr.1 and Add.1);

(*d*) A select bibliography on succession of States in respect of State property, archives and debts (ST/LIB/SER.B/39), prepared by the Dag Hammarskjold Library of the United Nations.

C. Organization of work

7. In accordance with the methods of work and procedures contained in the memorandum by the Secretary-General (A/CONF.117/3), which the Conference approved at its 2nd plenary meeting (A/CONF.117/9), held on 1 March 1983, and on the understanding that the Conference and its organs would have the necessary flexibility to adjust these methods and procedures to their needs, the Committee of the Whole decided to defer consideration of Part I (articles 1 to 6) until it had concluded its initial consideration of the remaining three parts and to start its work by considering Part II of the draft entitled "State property", article 7 being the first to be taken up.

8. The Committee of the Whole proceeded mainly by way of article-by-article discussion of the draft articles before it and related amendments. In most cases, after initial consideration by the Committee of the Whole of the draft article and the amendment or amendments thereto, as the case might be, the text of the article was referred to the Drafting Committee, sometimes with drafting suggestions and recommendations relating thereto.

9. In the case of articles 15, 23 and 27 the Committee of the Whole subsequently considered, on the basis of the corresponding report of the Drafting Committee (A/CONF.117/C.1/1), the drafting recommended by the Drafting Committee for the articles and pronounced itself on that drafting.[2] In some instances, the Committee of the Whole referred specific articles or proposed new articles and the amendments relating thereto to a working group.

10. At its 12th meeting, held on 9 March 1983, the Committee of the Whole entrusted the Drafting Committee with the preparation of drafts, for submission directly to the plenary, concerning the preamble and the final clauses of the future convention.

11. At its 39th meeting, held on 29 March 1983, the Committee of the Whole decided that the Drafting Committee should submit directly to the plenary of the Conference its report on the articles referred to it,[3] in conformity with rule 47 of the rules of procedure. This decision was taken without prejudice to previous decisions of the Committee of the Whole concerning articles 15, 23 and 27, whereby the Committee of the Whole had requested the Drafting Committee to submit to it a recommendation on specific drafting points relating to those three articles.

12. The report of the Drafting Committee submitted for articles 15, 23 and 27 (A/CONF.117/C.1/1) took the form of the texts adopted. The report did not elaborate upon particular points considered or the reasons why certain amendments which had been referred to the Drafting Committee as drafting points had, or had not, been adopted. The Chairman of the Drafting Committee explained the main considerations which had resulted in the recommendations concerned. This statement by the Chairman of the Drafting Committee is to be found in the summary record of the 42nd meeting of the Committee of the Whole.

D. Structure of the report

13. The present report is organized as follows: Chapter I contains the "Introduction". Chapter II is entitled "Consideration by the Committee of the Whole of the draft articles on succession of States in respect of State property, archives and debts prepared by the International Law Commission". Chapter III of the report deals with the proposals submitted for the final clauses.

14. Chapter II describes the proceedings of the Committee of the Whole, article by article, in numerical order. In most cases, the articles in Chapter II are dealt with as follows: First, the text of the International Law Commission's draft article, or of the proposed new article, is set out; next come the texts of amendments, if any; the proceedings of the Committee of the Whole are then described.

15. Chapter II is designed to be read in conjunction with the summary records of the Committee of the Whole (A/CONF.117/C.1/SR.1 to 44).

16. The check-list of documents submitted to the Committee of the Whole by States participating in the Conference is contained in the Index to the documents of the Conference.

[2] The titles and texts of articles 15, 23 and 27 adopted by the Committee of the Whole are contained in document A/CONF.117/10/Add.1.

[3] The reports of the Drafting Committee took the form of the texts contained in documents A/CONF.117/10 and Add.2 and 3 and A/CONF.117/13.

Chapter II

CONSIDERATION BY THE COMMITTEE OF THE WHOLE OF THE DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS

[Note concerning Part I. General provisions (Articles 1 to 6).

In view of the decision concerning these articles which is recorded in paragraph 7 above, the description of the proceedings concerning the articles in question appears at the end of chapter II.]

PART II. STATE PROPERTY

ARTICLE 7

A. International Law Commission text

17. The International Law Commission text provided as follows:

Article 7. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State property.

B. Amendments

18. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

19. The Committee initially considered the article at its 1st and 40th meetings on 2 and 30 March 1983.

20. At its 1st meeting, the Committee decided to defer consideration of the article until it took up articles 1 to 6.

21. At its 40th meeting, the Committee considered the possibility, suggested by Greece, of merging articles 7, 18 and 30 with article 1. At the same meeting, it voted on the principle of such a merger, which it rejected by 42 votes to 20, with 3 abstentions. It then adopted the text of the International Law Commission for article 7 and referred it to the Drafting Committee.[4]

ARTICLE 8

A. International Law Commission text

22. The International Law Commission text provided as follows:

Article 8. State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

B. Amendments

23. Amendments were submitted to the article by Denmark and France.

24. These amendments were to the following effect:

(a) *Denmark* (A/CONF.117/C.1/L.1)

Redraft the article as follows:

For the purposes of the articles in the present Part, "State property" means all that is owned by the predecessor State, according to its internal law, at the date of the succession of States.

[Withdrawn; see para. 26 below.]

(b) *France* (A/CONF.117/C.1/L.5)

Redraft the article as follows:

For the purposes of the articles in the present Part, "State property" means property, rights and interests, including the obligations attaching to them, which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Commentary

State property which is the object of the succession of States must pass from the predecessor State to the successor State with the obligations attaching to it (for example, charges or mortgages attaching to buildings).

This derives from the general principles of the law of property and obligations, and it holds good even in the absence of mention in article 8. However, it might be advisable to supplement the text by making the above drafting amendment.

[Withdrawn but brought to the attention of the Drafting Committee; see para. 27 below.]

C. Proceedings of the Committee of the Whole

25. The Committee considered the article and the amendments thereto at its 1st, 5th and 6th meetings on 2 and 4 March 1983.

26. At the 6th meeting of the Committee the amendments by Denmark and France were withdrawn.

27. At the same meeting, the Committee adopted the text of the International Law Commission for article 8 without a vote. It referred that text to the Drafting Committee and also drew the attention of the Drafting Committee to the amendment to article 8 submitted by France (see paragraph 24(*b*) above).[4]

ARTICLE 9 AND PROPOSAL FOR A NEW ARTICLE 8 *bis*

A. International Law Commission text

28. The International Law Commission text of article 9 provided as follows:

Article 9. Effects of the passing of State property

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part.

B. Amendments

29. Amendments were submitted to the article by Austria, the Federal Republic of Germany, Greece and France.

[4] The report of the Drafting Committee on this article is contained in document A/CONF.117/10.

30. These amendments were to the following effect:

(a) *Austria* (A/CONF.117/C.1/L.2)

Redraft the article as follows:

A succession of States has the effect that the rights of the predecessor State to State property pass to the successor State in accordance with the provisions of the articles in the present Part.

[Withdrawn; see para. 34 below.]

(b) *Federal Republic of Germany* (A/CONF.117/C.1/L.3)

Redraft the article as follows:

A succession of States entails the extinction of the rights of the predecessor State and, to the extent to which the predecessor State owned such rights, the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present Part.

[Withdrawn; see para. 35 below.]

(c) *Greece* (A/CONF.117/C.1/L.7)

Redraft the article as follows:

A succession of States has the effect of making the property of the predecessor State, as defined in article 8, pass to the successor State in accordance with the provisions of the articles in the present Part.

[Withdrawn; see para. 35 below.]

(d) *France* (A/CONF.117/C.1/L.21)

Redraft the article as follows:

1. A succession of States has the effect of making the State property of the predecessor State pass to the successor State in accordance with the provisions of the present Part.

2. In consequence of this, a succession of States entails the extinction of the rights of the predecessor State to such of the State property as passes to the successor State and the concomitant origination of identical rights of the successor State to the said property.

[Rejected; see para. 35 below.]

C. Proposal for a new article 8 *bis*

31. The Committee of the Whole also had before it an amendment submitted by Algeria (A/CONF.117/C.1/L.22) seeking to insert a new article 8 *bis* before article 9.

32. The proposed new article, as orally revised, read as follows:

Article 8 bis. Passing of State property

A succession of States has the effect of causing the State property of the predecessor State to pass to the successor State in accordance with the provisions of the articles in the present Part.

[Adopted but subsequently deleted following the report of the Working Group; see paras. 36 and 38 below.]

D. Proceedings of the Committee of the Whole

33. The Committee considered article 9 and the amendments thereto, at its 1st, 2nd, 6th, 7th, 9th, and 10th meetings on 2, 4, 7, and 8 March 1983, as well as the proposal seeking to insert a new article 8 *bis* before article 9, at its 9th and 10th meetings, on 8 March of the same year.

34. At the 6th meeting the amendment submitted by Austria (A/CONF.117/C.1/L.2) was withdrawn and at the 9th meeting Greece withdrew its amendment (A/CONF.117/C.1/L.7).

35. At the 10th meeting the amendment submitted by the Federal Republic of Germany (A/CONF.117/C.1/L.3) was withdrawn and the amendment submitted by France (A/CONF.117/C.1/L.21) was rejected by 29 votes to 21, with 10 abstentions. Also at the 10th meeting, the Committee adopted the text of the International Law Commission for article 9, by 45 votes to none, with 18 abstentions, and referred it to the Drafting Committee.

36. At its 10th meeting the Committee of the Whole also adopted the amendment of Algeria (A/CONF.117/C.1/L.22, as orally revised), seeking to insert a new article 8 *bis* before article 9, by 35 votes to none, with 21 abstentions, and referred the text of the amendment to the Drafting Committee.

37. At its 42nd meeting, the Committee had before it the report of the Working Group (A/CONF.117/C.1/L.62)[5] which it had established at its 40th meeting under the chairmanship of the representative of Morocco.

38. At the same meeting, the Committee approved the above report and accordingly decided to delete article 8 *bis*.

39. In addition, under the above report, the text of article 9 was modified as follows: the words "A succession of States entails" were replaced by the words "The passing of State property entails" and the words "in accordance with" were replaced by the words "subject to".

40. The Committee of the Whole referred the text of article 9, thus amended, to the Drafting Committee.[4]

ARTICLE 10

A. International Law Commission text

41. The International Law Commission text provided as follows:

Article 10. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

B. Amendments

42. Amendments to article 10 were submitted by Egypt, later joined by Kenya and the Netherlands, and to articles 10, 21 and 33 by Greece.

43. The amendments were to the following effect:

(a) *Egypt* (A/CONF.117/C.1/L.17), later joined by *Kenya* and the *Netherlands*.

Replace the words "Unless otherwise agreed or decided" by the words "Unless otherwise agreed by the States concerned or decided by an appropriate international body".

[Adopted; see para. 46 below.]

(b) *Greece* (A/CONF.117/C.1/L.4)

Replace articles 10, 21 and 33 by the following article [to be inserted in Part I, General provisions]:

Except as otherwise determined, the date of the passing of State property, archives and debts is that of the succession of States.

[Withdrawn; see para. 45 below.]

[5] For the full text of the report of the Working Group see paragraph 190 below.

C. Proceedings of the Committee of the Whole

44. The Committee considered the article and the amendments thereto at its 2nd, 6th, 8th and 9th meetings on 2, 4, 7 and 8 March 1983.

45. At the 8th meeting the amendment submitted by Greece was withdrawn.

46. At the 9th meeting the amendment sponsored by Egypt, Kenya and the Netherlands was adopted by 24 votes to 10, with 23 abstentions. At the same meeting, the Committee adopted the text of the International Law Commission for article 10, as amended, by 44 votes to 4, with 12 abstentions, and referred it to the Drafting Committee.[4]

ARTICLE 11

A. International Law Commission text

47. The International Law Commission text provided as follows:

Article 11. Passing of State property without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

B. Amendment

48. An amendment was submitted to the article by *Egypt* (A/CONF.117/C.1/L.6), later joined by *Kenya* and the *Netherlands*.

49. The amendment was to the following effect:

Replace the opening phrase by: "Subject to the provisions of the articles in the present Part and unless otherwise agreed by the States concerned or decided by an appropriate international body . . ."

[Adopted; see para. 51 below.]

C. Proceedings of the Committee of the Whole

50. The Committee considered the article and the amendment thereto at its 2nd, 3rd, 6th and 9th meetings on 2, 3, 4 and 8 March 1983.

51. At its 9th meeting, the Committee adopted without a vote the amendment sponsored by Egypt, Kenya and the Netherlands. At the same meeting, it adopted the text of the International Law Commission for article 11, as amended, without a vote and referred it to the Drafting Committee, together with an oral drafting suggestion made by Finland.[4]

ARTICLE 12

A. International Law Commission text

52. The International Law Commission text provided as follows:

Article 12. Absence of effect of a succession of States on the property of a third State

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

B. Amendments

53. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

54. The Committee of the Whole considered article 12 at its 3rd, 4th, 5th and 9th meetings on 3, 4 and 8 March 1983.

55. At its 9th meeting, the Committee adopted the text of the International Law Commission for article 12 without a vote, and referred it to the Drafting Committee.[4]

ARTICLE 12 *bis*[5]

A. Text of the proposed new article

56. An amendment seeking to insert a new article 12 *bis* was submitted by the United Arab Emirates (A/CONF.117/C.1/L.59). The text of the proposed new article, as orally revised,[7] read as follows:

Article 12 bis. *Preservation and safety of State property*

For the purpose of the implementation of the provisions of the articles of the present Part, the predecessor State shall take all measures to prevent damage or destruction to State property which, according to the provisions of the articles of the present Part, pass to the successor State.

[Adopted; see para. 58 below.]

B. Proceedings of the Committee of the Whole

57. The Committee of the Whole considered the proposed new article at its 40th and 42nd meetings held on 30 and 31 March 1983.

58. At its 42nd meeting, the Committee adopted by consensus the proposed new article as orally revised and referred it to the Drafting Committee.[4]

ARTICLE 13[8]

A. International Law Commission text

59. The International Law Commission text provided as follows:

Article 13. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

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[5] Article 12 *bis* is numbered 13 in the Convention as adopted.

[7] In its original version, the amendment read as follows:

Article 12 bis. *Preservation and safety of State property*

For the purpose of the implementation of the provisions of this Convention, an obligation to the predecessor State to transfer State property to the successor State entails the consequential obligation to take all measures to prevent damage or destruction to any part of State property which, according to the provisions of the articles of the present Part, pass to the successor State.

[8] Article 13 is numbered 14 in the Convention as adopted.

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

B. Amendments

60. Amendments were submitted to the article by *France* (A/CONF.117/C.1/L.16 and Corr.1).

61. These amendments were to the following effect:

(*a*) In paragraph 1, delete the words "by that State".

[Rejected; see para. 63(*a*) below.]

(*b*) Redraft paragraph 2(*b*) to read as follows:

(*b*) movable State property of the predecessor State having a direct and necessary connection with the administration and management of the territory to which the succession of States relates shall pass to the successor State;

[Rejected; see para. 63(*b*) below.]

(*c*) In paragraph 2, add a new subparagraph (*c*) reading as follows:

(*c*) the predecessor State shall, however, retain the property necessary for the functioning of those services which it maintains or establishes on the territory of the successor State with the agreement of the latter.

[Rejected; see para. 63(*c*) below.]

C. Proceedings of the Committee of the Whole

62. The Committee of the Whole considered the article and the amendments thereto at its 11th and 12th meetings on 9 March 1983.

63. At its 12th meeting, the Committee voted on the amendments to article 13 as follows:

(*a*) It rejected the first amendment by 35 votes to 19, with 6 abstentions;

(*b*) It rejected the second amendment by 31 votes to 20, with 7 abstentions;

(*c*) It rejected the third amendment by 39 votes to 10, with 10 abstentions.

64. The Committee of the Whole then adopted the text of the International Law Commission for article 13 by 40 votes to none, with 18 abstentions, and referred it to the Drafting Committee.[4]

ARTICLE 14[5]

A. International Law Commission text

65. The International Law Commission text provided as follows:

Article 14. Newly independent State

1. When the successor State is a newly independent State:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) immovable property having belonged to the territory to which the succession of States relates, situated outside it and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*c*) immovable State property of the predecessor State other than that mentioned in subparagraph (*b*) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(*d*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*e*) movable property having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*f*) movable State property of the predecessor State other than the property mentioned in subparagraphs (*d*) and (*e*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

B. Amendments

66. Amendments were submitted to the article by the Netherlands and by the United Kingdom of Great Britain and Northern Ireland.

67. These amendments were to the following effect:

(a) *Netherlands* (A/CONF.117/C.1/L.18)

Redraft paragraph 4 to read as follows:

Any agreement concluded between the predecessor State and the newly independent State to determine succession to State property shall pay due regard to the newly independent State's permanent sovereignty over its natural resources in accordance with international law.

[Rejected; see para. 69(*b*) below.]

(b) *United Kingdom* (A/CONF.117/C.1/L.19)

Replace paragraph 1 by the following:

1. When the successor State is a newly independent State:

(*a*) State property of the predecessor State shall pass to the successor State to the extent so agreed between them;

(*b*) in the absence of such an agreement, State property vested in the government of the territory to which the succession of States relates shall pass to the successor State;

(*c*) where neither subparagraph (*a*) nor (*b*) applies, State property of the predecessor State, which has a direct and necessary link with the management and administration of the territory to which the succession of States relates, shall pass to the successor State.

[Rejected; see para. 69(*a*) below.]

C. Proceedings of the Committee of the Whole

68. The Committee considered the article and the amendments thereto at its 13th, 14th, 15th and 16th meetings on 10 and 11 March 1983.

[5] Article 14 is numbered 15 in the Convention as adopted.

69. At the 16th meeting, the Committee voted on the amendments as follows:

(*a*) It rejected the amendment submitted by the United Kingdom by 41 votes to 19, with 2 abstentions;

(*b*) It rejected the amendment submitted by the Netherlands by 40 votes to 21, with 1 abstention.

70. The Committee then adopted the text of the International Law Commission for article 14 by 43 votes to 21, with no abstentions and referred it to the Drafting Committee.[9]

ARTICLE 15[10]

A. International Law Commission text

71. The International Law Commission text provided as follows:

Article 15. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

B. Amendments

72. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

73. The Committee considered the article at its 16th and 42nd meetings on 11 and 31 March 1983.

74. At its 16th meeting, the Committee adopted the text of the International Law Commission for article 15 without a vote, and referred it to the Drafting Committee.

75. The Committee further requested the Drafting Committee to submit to it, in conformity with rule 47, paragraph 2, of the rules of procedure, a recommendation on the desirability of retaining or deleting paragraph 2 of article 15 after having examined it in the context of that article and in relation to corresponding provisions in other parts of the draft articles. The Committee also referred to the drafting Committee a suggestion for the replacement, in the English text of the article, of "a" at the beginning of paragraph 1, by the word "one".

76. At its 42nd meeting, the Committee had before it the report of the Drafting Committee (A/CONF.117/C.1/1)[11] containing the text of article 15 adopted by the Drafting Committee. The Committee of the Whole adopted that text without a vote.

D. Text adopted by the Committee of the Whole

77. On the basis of the foregoing, the Committee of the Whole recommends to the Conference for adoption the following text of article 15:

Article 15. Uniting of States

When two or more States unite and so form one successor State, the State property of the predecessor States shall pass to the successor State.

ARTICLE 16[12]

A. International Law Commission text

78. The International Law Commission text provided as follows:

Article 16. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property of the predecessor State other than that mentioned in subparagraph (*b*) shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States.

B. Amendments

79. Amendments were submitted to the article by *Pakistan* (A/CONF.117/C.1/L.8/Rev.1).

80. These amendments were to the following effect:

(*a*) Replace paragraph 1(*b*) by the following:

(*b*) movable State property of the predecessor State having a direct and necessary connection with the administration and management of the territory to which the succession of States relates shall pass to the successor State.[13]

[Rejected; see para. 82(*a*) below.]

(*b*) Delete paragraph 1(*c*)

[Rejected; see para. 82(*b*) below.]

C. Proceedings of the Committee of the Whole

81. The Committee considered article 16 and the amendments thereto submitted by Pakistan at its 16th, 17th and 19th meetings on 11, 14 and 15 March 1983.

[9] Article 15 is numbered 16 in the Convention as adopted.

[10] The report of the Drafting Committee (A/CONF.117/C.1/1) took the form of the texts adopted by that Committee for articles 15, 23 and 27. These texts are identical with those contained in paragraphs 77, 129 and 161 respectively. For the titles and texts of articles 15, 23 and 27 as adopted by the Committee of the Whole, see document A/CONF.117/10/Add.1.

[12] Article 16 is numbered 17 in the Convention as adopted.

[13] In its original version (A/CONF.117/C.1/L.8), the amendment to paragraph 1(*b*) read as follows:

The words "connected with the activity of the predecessor State in respect of" should be replaced by the words "situated in". The amended subparagraph would thus read: "(*b*) movable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State."

82. At its 19th meeting, the Committee voted on those amendments as follows:

(*a*) It rejected the amendment to paragraph 1(*b*) by 30 votes to 18, with 12 abstentions;

(*b*) It rejected the amendment for the deletion of paragraph 1(*c*) by 37 votes to 13, with 12 abstentions.

83. The Committee then adopted the text of the International Law Commission for article 16 by 46 votes to none, with 17 abstentions, and referred it to the Drafting Committee.[4]

ARTICLE 17[14]

A. International Law Commission text

84. The International Law Commission text provided as follows:

Article 17. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions;

(*c*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(*d*) movable State property of the predecessor State other than that mentioned in subparagraph (*c*) shall pass to the successor States in equitable proportions.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation among the successor States that may arise as a result of a succession of States.

B. Amendments

85. No amendment was submitted to article 17.

C. Proceedings of the Committee of the Whole

86. The Committee considered article 17 at its 17th meeting on 14 March 1983.

87. At that meeting, the Committee adopted the text of the International Law Commission for article 17 without a vote, and referred it to the Drafting Committee.[4]

PART III. STATE ARCHIVES

ARTICLE 18[15]

A. International Law Commission text

88. The International Law Commission text provided as follows:

Article 18. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State archives.

[14] Article 17 is numbered in the Convention as adopted.

[15] Article 18 is numbered in the Convention as adopted.

B. Amendments

89. No amendment was submitted.

C. Proceedings of the Committee of the Whole

90. The Committee considered article 18 at its 18th and 40th meetings on 14 and 30 March 1983.

91. At its 18th meeting, the Committee decided to defer consideration of article 18 until it took up articles 1 to 6.

92. At its 40th meeting, the Committee considered the possibility, suggested by Greece, of merging articles 7, 18 and 30 with article 1. At the same meeting, it voted on the principle of such a merger, which it rejected by 42 votes to 20, with 3 abstentions. It then adopted the text of the International Law Commission for article 18 and referred it to the Drafting Committee.[4]

ARTICLE 19[16]

A. International Law Commission text

93. The International Law Commission text provided as follows:

Article 19. State archives

For the purposes of the present articles, "State archives" means all documents of whatever kind which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been kept by it as archives.

B. Amendments

94. Amendments were submitted to the article by the United Kingdom of Great Britain and Northern Ireland, Kenya, Algeria and Austria.

95. These amendments were to the following effect:

(a) *United Kingdom* (A/CONF.117/C.1/L.20)

Delete the phrase "according to its internal law" and insert "and according to the internal law of the predecessor State" after "at the date of the succession of States". The article would then read:

For the purposes of the present articles, "State archives" means all documents of any kind which, at the date of the succession of States and according to the internal law of the predecessor State, belonged to the predecessor State and had been kept by it as archives.

[Referred to the Working Group; see para. 97 below.]

(b) *Kenya* (A/CONF.117/C.1/L.27)

Delete the words "and had been kept by it as archives."

[Referred to the Working Group; see para. 97 below.]

(c) *Algeria* (A/CONF.117/C.1/L.34/Rev.1)[17]

Replace the words "and had been kept by it as archives" by "and had been kept by it for official, historical, cultural, economic, scientific, practical or other purposes".

[Referred to the Working Group; see para. 97 below.]

[16] Article 19 is numbered 20 in the Convention as adopted.

[17] In the original version (A/CONF.117/C.1/L.34), the word "cultural" did not appear and the conjunction "and" was used before the word "other".

(d) *Austria* (A/CONF.117/C.1/L.35)

Replace the words "means all documents of whatever kind which . . ." by the words "means documentary material of whatever kind amassed and deliberately preserved by State institutions in the course of their activities which . . .".

[Referred to the Working Group; see para. 97 below.]

C. Proceedings of the Committee of the Whole

96. The Committee considered article 19 and the amendments thereto at its 18th, 19th, 20th, 26th and 27th meetings, on 14, 15, 21 and 22 March 1983.

97. At its 20th meeting, the Committee decided to set up a working group to deal with article 19 and the written and oral amendments and sub-amendments thereto, to be chaired by the representative of Poland.

98. At the 26th meeting the Chairman of the Working Group on article 19 introduced the text suggested by the Working Group for article 19 (A/CONF.117/C.1/L.45). This text reads as follows:

Article 19. State archives

For the purposes of the articles in the present Part, "State archives" means all documents of whatever date and kind, produced or received by the predecessor State [in the exercise of its functions] which, at the date of the succession of States, belonged to the predecessor State according to its internal law and were preserved by it [directly or under its control] as archives [for whatever purpose].

99. At its 27th meeting, the Committee adopted the above text, with the deletion of the square brackets, without a vote and referred it to the Drafting Committee.[4]

ARTICLE 20[18] AND PROPOSALS FOR A NEW ARTICLE 19 *bis*

A. International Law Commission text

100. The International Law Commission text of article 20 provided as follows:

Article 20. Effects of the passing of State archives

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

B. Amendments

101. An amendment was submitted to the article, in written form, by the Netherlands and a subamendment was submitted orally by Algeria at the 22nd meeting.

102. These amendments were to the following effect:

(a) *Netherlands* (A/CONF.117/C.1/L.33)

Insert the word "simultaneous" between the words "the" and "arising" in the second line.

[Rejected; see para. 105 below.]

(b) *Algeria* (Oral subamendment to the above amendment)

Insert the words ", simultaneous in appropriate cases of succession," after "arising".

[Withdrawn; see para. 105 below.]

C. Proposals for a new article 19 *bis*

103. In addition, the Committee had before it amendments seeking to insert a new article 19 *bis* before article 20 as follows:

(a) *Algeria* (A/CONF.117/C.1/L.39)

Article 19 bis. *Passing of State archives*

A succession of States has the effect of making the State archives of the predecessor State pass to the successor State in accordance with the provisions of the articles of the present Part.

[Withdrawn; see para. 105 below.]

(b) *United States of America* (A/CONF.117/C.1/L.42)

Article 19 bis. *Passing of State archives*

A succession of States has the effect of making the State archives of the predecessor State pass to the successor State in accordance with the provisions of the articles of the present Part.

[Withdrawn; see para. 108 below.]

(c) *Greece* (A/CONF.117/C.1/L.54)

Article 19 bis. *Passing of State archives*

The provisions of article 8 *bis* concerning the passing of State property apply *mutatis mutandis* to State archives to the extent that such archives pass from the predecessor State to the successor State in accordance with the provisions of the present Part.

[Withdrawn; see para. 108 below.]

D. Proceedings of the Committee of the Whole

104. The Committee considered article 20 and the amendments thereto at its 20th, 21st and 22nd meetings, on 15, 16 and 17 March 1983. It considered the amendments seeking to insert a new article 19 *bis* between articles 19 and 20 at its 22nd, 23rd, 39th and 42nd meetings on 17, 18, 29 and 31 March 1983.

105. At the 22nd meeting of the Committee the oral subamendment to article 20 presented by Algeria was withdrawn. At the same meeting the Committee rejected the amendment submitted by the Netherlands (A/CONF.117/C.1/L.33) by 32 votes to 21, with 8 abstentions. It then adopted the text of the International Law Commission for article 20 by 47 votes to 4, with 13 abstentions, and referred it to the Drafting Committee. Also at the 22nd meeting, the amendment seeking to insert a new article 19 *bis* between articles 19 and 20 (A/CONF.117/C.1/L.39) was withdrawn by Algeria and reintroduced by the United States of America (A/CONF.117/C.1/L.42).

106. At its 23rd meeting, the Committee decided to defer consideration of the proposed new article 19 *bis* to a later stage.

107. At its 42nd meeting, the Committee had before it the report of the Working Group which it had established at its 40th meeting under the chairmanship of the representative of Morocco (A/CONF.117/C.1/L.62).[19]

[18] Article 20 is numbered 21 in the Convention as adopted.

[19] For the full text of the report of the Working Group, see para. 190 below.

108. At the same meeting, the Committee approved that report, under which the amendments submitted by the United States of America (A/CONF.117/C.1/L.42) and Greece (A/CONF.117/C.1/L.54) for an article 19 *bis* were to be considered withdrawn.

109. In addition, under the same report, the text of article 20 was modified as follows: the words "A succession of States entails" were replaced by the words "The passing of State archives entails" and the words "in accordance with" were replaced by the words "subject to".

110. The Committee referred the text of article 20, as thus amended, to the Drafting Committee.[4]

ARTICLE 21[20]

A. International Law Commission text

111. The International Law Commission text provided as follows:

Article 21. Date of the passing of States archives

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

B. Amendments

112. Amendments were submitted to the article by Austria and Egypt.

113. These amendments were to the following effect:

(a) *Austria* (A/CONF.117/C.1/L.26)

Add a second paragraph as follows:

2. The actual transfer of the State archives concerned shall take place without delay, if necessary upon previous specification, in accordance with the articles in the present Part.

[Withdrawn; see para. 115 below.]

(b) *Egypt* (A/CONF.117/C.1/L.41)

Replace the opening words by: "Unless otherwise agreed by the States concerned or decided by an appropriate international body".

[Adopted; see para. 116 below.]

C. Proceedings of the Committee of the Whole

114. The Committee considered article 21 and the amendments thereto at its 22nd and 23rd meetings on 17 and 18 March 1983.

115. At the 23rd meeting the amendment submitted by Austria was withdrawn.

116. At the same meeting, the Committee of the Whole adopted without a vote the amendment submitted by Egypt. It then adopted without a vote the text of the International Law Commission for article 21, as amended, and referred it to the Drafting Committee.[4]

ARTICLE 22[21]

A. International Law Commission text

117. The International Law Commission text provided as follows:

Article 22. Passing of State archives without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives from the predecessor State to the successor State shall take place without compensation.

B. Amendments

118. An oral amendment was submitted to article 22 by *Egypt* at the 23rd meeting.

119. The amendment was to the following effect:

Replace the words "unless otherwise agreed or decided" by the words "unless otherwise agreed by the States concerned or decided by an appropriate international body."

[Adopted; see para. 121 below.]

C. Proceedings of the Committee of the Whole

120. The Committee considered the article and the oral amendment thereto at its 23rd meeting on 18 March 1983.

121. At that meeting, the Committee adopted without a vote the oral amendment submitted by Egypt. At the same meeting, it adopted without a vote the text of the International Law Commission for article 22, as orally amended, and referred it to the Drafting Committee.[4]

ARTICLE 23[22]

A. International Law Commission text

122. The International Law Commission text provided as follows:

Article 23. Absence of effect of a succession of States on the archives of a third State

A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

B. Amendments

123. Amendments were submitted to article 23 in writing by Nigeria and orally, at the 23rd meeting, by the Netherlands and Greece.

124. The amendments were as follows:

(a) *Nigeria* (A/CONF.117/C.1/L.44)

Delete the words "of the predecessor State" contained in the third line, and replace them by the words "to which the succession of States relates."

[Withdrawn; see para. 126 below.]

(b) *Netherlands* (oral amendment)

Delete "State" before "archives".

[Referred to the Drafting Committee; see para. 127 below.]

(c) *Greece* (oral amendment)

Delete "as such" in the opening phrase.

[Withdrawn; see para. 126 below.]

[20] Article 21 is numbered 22 in the Convention as adopted.
[21] Article 22 is numbered 23 in the Convention as adopted.
[22] Article 23 is numbered 24 in the Convention as adopted.

C. Proceedings of the Committee of the Whole

125. The Committee considered the article and the amendments thereto at its 23rd, 24th and 42nd meetings, on 18 and 31 March 1983.

126. At the 24th meeting the amendments of Nigeria and Greece were withdrawn.

127. At the same meeting, the Committee adopted the text of the International Law Commission for article 23 without a vote and referred it to the Drafting Committee together with the oral drafting suggestion of the Netherlands. It requested the Drafting Committee to submit to it a recommendation on the use of the term "State archives" in article 23, taking into account the definition of that term in article 19.

128. At its 42nd meeting, the Committee had before it the report of the Drafting Committee (A/CONF.117/C.1/1)[23] containing the text of article 23 adopted by the Drafting Committee. The Committee of the Whole adopted that text without a vote.

D. Text adopted by the Committee of the Whole

129. On the basis of the foregoing, the Committee recommends to the Conference for adoption the following text of article 23:

Article 23. Absence of effect of a succession of States on the archives of a third State

A succession of States shall not as such affect archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

PROPOSAL FOR A NEW ARTICLE 23 *bis*

A. Text of the proposed new article

130. An amendment for the insertion of a new article was submitted by *Austria*, *Denmark* and *France* (A/CONF.117/C.1/L.28).

131. The amendment was to the following effect:

Insert between articles 23 and 24 of the International Law Commission draft an article 23 *bis*, reading as follows:

Article 23 bis. *Preservation of rights in connection with a succession of States in respect of State archives*

In connection with a succession of States, the States concerned shall respect, in a non-discriminatory manner,

(*a*) the preservation of the right to privacy and personal security with regard to information contained in State archives; and

(*b*) the preservation of rights concerning access to State archives.

[Rejected; see para. 133 below.]

B. Proceedings of the Committee of the Whole

132. The Committee considered article 23 *bis* at its 24th meeting on 18 March 1983.

133. At its 24th meeting, the Committee rejected the amendment submitted by Austria, Denmark and France for the proposed new article by 41 votes to 20, with 7 abstentions.

[23] See footnote 11 above.

ARTICLE 24[24]

A. International Law Commission text

134. The International Law Commission text provided as follows:

Article 24. Preservation of the unity of State archives

Nothing in the present part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the unity of State archives.

B. Amendments

135. Amendments were submitted to the article, in writing, by Pakistan and Switzerland and, in oral form, at the 25th meeting, by Morocco.

136. These amendments were to the following effect:

(a) *Pakistan* (A/CONF.117/C.1/L.9)

Delete the article.

[Withdrawn; see para. 138 below.]

(b) *Switzerland* (A/CONF.117/C.1/L.29/Rev.2, as orally revised) by the representative of France[25] at the 25th meeting,

The present text should become paragraph 1.

Add the following paragraph:

2. In particular, in cases where archive collections are simultaneously part of the national heritage of the predecessor State and one or more successor States and cannot be divided up without substantial jeopardy to their legal, administrative or historical value, these States should be guided by the archival concept of joint heritage for the purpose of the utilization of such collections.

[Rejected; see para. 139 below.]

(c) *Morocco* (Oral amendment)

In the title and at the end of the text of the article, replace the words "unity of State archives" by the words "integrity of State archive collections".

[Adopted; see para. 139 below.]

C. Proceedings of the Committee of the Whole

137. The Committee considered article 24 at its 24th, 25th and 26th meetings on 18 and 21 March 1983.

138. At the 25th meeting the amendment submitted by Pakistan was withdrawn.

139. At the same meeting, the Committee rejected the amendment submitted by Switzerland as orally revised at the suggestion of the representative of France, by 32 votes to 17, with 14 abstentions. It adopted the oral amendment presented by Morocco by 54 votes to none, with 10 abstentions. It then adopted the International Law Commission text for article 24, as orally amended, by 65 votes to none, with 1 abstention, and referred it to the Drafting Committee.[4]

[24] Article 24 is numbered 25 in the Convention as adopted

[25] The oral revision by France of the amendment of Switzerland was to replace the word "shall" by "should" and to delete the words "management and" before "utilization" in the final phrase of the proposed new paragraph 2.

PROPOSAL FOR A NEW ARTICLE 24 *bis*[26]

A. Text of the proposed new article

140. An amendment seeking to insert a new article 24 *bis* between articles 24 and 25 was submitted by the United Arab Emirates. The first revised version of the proposed new article (A/CONF.117/C.1/L.50/Rev.1,[27] as orally revised) read as follows:

Article 24 bis. *Preservation and safety of State archives*

For the purpose of the implementation of the provisions of the articles of the present Part, the predecessor State shall take all measures to prevent damage or destruction to State archives which, according to the present Convention, pass to the successor State.

[Adopted; see para. 142 below.]

B. Proceedings of the Committee of the Whole

141. The Committee considered the proposed new article 24 *bis* at its 33rd, 35th, 37th, 39th, 40th and 42nd meetings on 24, 25, 28, 29, 30 and 31 March 1983.

142. At its 42nd meeting, the Committee adopted by consensus the proposed new article 24 *bis* (A/CONF.117/C.1/L.50/Rev.1, as orally revised) and referred it to the Drafting Committee.[4]

ARTICLE 25[28]

A. International Law Commission text

143. The International Law Commission text provided as follows:

Article 25. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

B. Amendments

144. Amendments were submitted to the article by Hungary and Austria.

145. These amendments were to the following effect:

(a) *Hungary* (A/CONF.117/C.1/L.30)

1. Replace paragraph 2 by the following text:

2. In the absence of such an agreement the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred shall pass to the successor State.

2. Paragraph 4 should become paragraph 3, reading as follows:

3. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of that part of its State archives, other than the part mentioned in paragraph 2, which relates exclusively or principally to the territory to which the succession of States relates or is connected with the interests of the transferred territory.

3. Paragraph 3 should become paragraph 4, reading as follows:

4. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of the relevant documents of State archives.

[All withdrawn; see para. 147 below.]

(b) *Austria* (A/CONF.117/C.1/L.31)

Paragraph 2(*b*)

Replace "that relates exclusively or principally" by "belonging or having belonged", so that the subparagraph would read:

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), belonging or having belonged to the territory to which the succession of States relates, shall pass to the successor State.

[Rejected; see para. 148 below.]

C. Proceedings of the Committee of the Whole

146. The Committee considered article 25 and the amendments thereto at its 26th meeting, on 21 March 1983.

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[26] Article 24 *bis* is numbered 26 in the Convention as adopted.

[27] As originally submitted (A/CONF.117/C.1/L.50), the text of the proposed new article read as follows:

Article 24 bis. *Preservation and safety of State archives*

Nothing in the present Part shall be considered as permitting in any way deliberate damaging or destroying of any State archives which, according to the provisions of the articles in the present Part, pass to the successor State.

A second revised version of the proposed new article (A/CONF.117/C.1/L.50/Rev.2) was circulated but not put to a decision. As orally revised, it read as follows:

Article 24 bis. *Preservation and safety of State archives*

For the purpose of the implementation of the provisions of the articles in the present Part, an obligation to the predecessor State to transfer State archives to the successor State entails the consequential obligation to take all measures to prevent damage or destruction to State archives which, according to the provisions of the articles of the present Part, pass to the successor State.

[28] Article 25 is numbered 27 in the Convention as adopted.

147. At the 26th meeting the amendments submitted by Hungary were withdrawn.

148. At the same meeting, the Committee rejected the amendment submitted by Austria by 21 votes to 12, with 35 abstentions. It then adopted the text of the International Law Commission for article 25 by 59 votes to 1, with 9 abstentions and referred it to the Drafting Committee.[4]

ARTICLE 26[29]

A. International Law Commission text

149. The International Law Commission text provided as follows:

Article 26. Newly independent State

1. When the successor State is a newly independent State:

(*a*) archives having belonged to the territory to which the succession of States relates and having become State archives of the predecessor State during the period of dependence shall pass to the newly independent State;

(*b*) the part of State archives of the predecessor State which for normal administration of the territory to which the succession of States relates should be in that territory shall pass to the newly independent State;

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those mentioned in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

B. Amendments

150. Amendments were submitted to the article by Nigeria and Egypt.

151. These amendments were to the following effect:

(a) *Nigeria* (A/CONF.117/C.1/L.40)

In paragraph 7 delete the words "shall not" before the word "infringe" and replace with the word "that". Add the words "shall be void" at the end of the article after the word "heritage".

[Withdrawn; see para. 153 below.]

(b) *Egypt* (A/CONF.117/C.1/L.46)

In paragraph 1, insert a new subparagraph (*c*) reading as follows:

(*c*) The part of State archives of the predecessor State, other than the parts mentioned in subparagraphs (*a*) and (*b*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

[Adopted; see para. 154 below.]

C. Proceedings of the Committee of the Whole

152. The Committee initially considered the article at its 27th, 28th and 29th meetings on 22 March 1983.

153. At the 29th meeting the amendment submitted by Nigeria was withdrawn.

154. At the same meeting, the Committee adopted the amendment submitted by Egypt by 31 votes to 9, with 22 abstentions. It then took a separate vote, at the request of the Netherlands, on paragraph 7 of the text of the International Law Commission. It decided to retain that paragraph by 44 votes to 20, with no abstentions. It then adopted the text of the International Law Commission for article 26, as amended, by 45 votes to 19, with 1 abstention, and referred it to the Drafting Committee.[4]

ARTICLE 27[30]

A. International Law Commission text

155. The International Law Commission text provided as follows:

Article 27. Uniting of States

1. When two or more States unite and so form a successor State, the State archives of the predecessor State shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or to its component parts shall be governed by the internal law of the successor State.

B. Amendments

156. No amendment was submitted to article 27.

C. Proceedings of the Committee of the Whole

157. The Committee considered the article at its 29th and 42nd meetings on 22 and 31 March 1983.

158. At its 29th meeting, the Committee adopted the text of the International Law Commission for article 27 without a vote and referred it to the Drafting Committee.

159. The Committee further requested the Drafting Committee to submit to it, in conformity with rule 47, paragraph 2, of the rules of procedure, a recommendation on the desirability of retaining or deleting paragraph 2 of article 27 after having examined it in the context of that article and in relation to corresponding provisions in other parts of the draft articles. The Committee also referred to the Drafting Committee a suggestion for the replacement, in the Engligh text, of "a" at the beginning of paragraph 1, by the word "one".

[29] Article 26 is numbered 28 in the Convention as adopted.

[30] Article 27 is numbered 29 in the Convention as adopted.

160. At its 42nd meeting, the Committee had before it the report of the Drafting Committee (A/CONF.117/C.1/1)[31] containing the text of article 27 adopted by the Drafting Committee. The Committee adopted that text without a vote.

D. Text adopted by the Committee of the Whole

161. On the basis of the foregoing, the Committee recommends to the Conference for adoption the following text of article 27:

Article 27. Uniting of States

When two or more States unite and so form one successor State, the State archives of the predecessor States shall pass to the successor State.

ARTICLE 28[32]

A. International Law Commission text

162. The International Law Commission text provided as follows:

Article 28. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor otherwise agree:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

3. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

B. Amendments

163. Amendments were submitted by Pakistan and Austria.

164. These amendments were to the following effect:

(a) *Pakistan* (A/CONF.117/C.1/L.10)

In paragraph 4, insert the words "or on an exchange basis" after the word "them" and before the word "make".

[Adopted; see para. 167 below.]

(b) *Austria* (A/CONF.117/C.1/L.32)

In paragraph 1(*b*), replace "that relates directly" by "belonging or having belonged".

[Withdrawn; see para. 166 below.]

C. Proceedings of the Committee of the Whole

165. The Committee considered article 28 at its 29th and 30th meetings on 22 and 23 March 1983.

166. At the 29th meeting the amendment submitted by Austria was withdrawn.

167. At its 30th meeting, the Committee adopted the amendment submitted by Pakistan by 45 votes to none, with 19 abstentions. It then adopted the text of the International Law Commission for article 28, as amended, by 43 votes to 21, with 1 abstention, and referred it to the Drafting Committee.[4]

ARTICLE 29[33]

A. International Law Commission text

168. The International Law Commission text provided as follows:

Article 29. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) the part of the State archives of the predecessor State which should be in the territory of a successor State for normal administration of its territory shall pass to that successor State;

(*b*) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory of a successor State shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

B. Amendments

169. An oral amendment was submitted at the 30th meeting, on 23 March 1983, by *Bangladesh* and *Tunisia*.

170. This amendment was to the following effect:

In paragraph 5, add the words "or on an exchange basis" before the word "appropriate".

[Adopted; see para. 172 below.]

[31] See footnote 11 above.

[32] Article 28 is numbered 30 in the Convention as adopted.

[33] Article 29 is numbered 31 in the Convention as adopted.

C. Proceedings of the Committee of the Whole

171. The Committee considered the article at its 30th meeting.

172. At the same meeting, the Committee adopted the oral amendment by Bangladesh and Tunisia by 45 votes to none, with 18 abstentions.

173. The Committee then adopted the text of the International Law Commission for article 29, as amended, by 44 votes to 21, with no abstentions and referred it to the Drafting Committee.[4]

PART IV. STATE DEBTS

ARTICLE 30[34]

A. International Law Commission text

174. The International Law Commission text provided as follows:

Article 30. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

B. Amendments

175. No amendment was submitted to article 30.

C. Proceedings of the Committee of the Whole

176. The Committee considered article 30 at its 30th and 40th meetings on 23 and 30 March 1983.

177. At its 30th meeting, the Committee decided to defer consideration of article 30 until it took up articles 1 to 6.

178. At its 40th meeting, the Committee considered the possibility, suggested by Greece, of merging articles 7, 18 and 30 with article 1. At the same meeting, it voted on the principle of such a merger, which it rejected by 42 votes to 20, with 3 abstentions. It then adopted the text of the International Law Commission for article 30 by 51 votes to 3, with 14 abstentions and referred it to the Drafting Committee.[4]

ARTICLE 31[35]

A. International Law Commission text

179. The International Law Commission text provided as follows:

Article 31. State debt

For the purposes of the articles in the present Part, "State debt" means any financial obligation of a State towards another State, an international organization or any other subject of international law.

B. Amendments

180. Amendments were submitted by Brazil and the Syrian Arab Republic.[36]

181. These amendments were to the following effect:

(a) *Brazil* (A/CONF.117/C.1/L.23)

Redraft the article as follows:

For the purposes of the articles in the present Part, "State debt" means:

(*a*) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(*b*) any other financial obligation chargeable to a State.

[Rejected; see para. 183 below.]

(b) *Syrian Arab Republic* (A/CONF.117/C.1/L.37, as orally revised)[37]

Redraft the text of the article as follows:

For the purposes of the articles in the present Part, "State debt" means any financial obligation of a State arising in conformity with international law towards another State, an international organization or any other subject of international law.

[Adopted; see para. 183 below.]

C. Proceedings of the Committee of the Whole

182. The Committee considered article 31 at its 30th, 31st, 32nd and 33rd meetings on 23 and 24 March 1983.

183. At the 33rd meeting the amendment submitted by Brazil was rejected by 35 votes to 23, with 5 abstentions. The amendment submitted by the Syrian Arab Republic, as orally revised, was adopted by 43 votes to none, with 20 abstentions. The Committee of the Whole then adopted the International Law Commission text for article 31, as amended, by 40 votes to 17, with 6 abstentions, and referred it to the Drafting Committee.[4]

ARTICLE 32[38] AND PROPOSALS FOR A NEW ARTICLE 31 *bis*

A. International Law Commission text

184. The International Law Commission text of article 32 provided as follows:

Article 32. Effects of the passing of State debts

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

B. Amendments

185. Amendments were submitted to article 32 by the Netherlands and by Kenya.

186. These amendments were to the following effect:

(a) *Netherlands* (A/CONF.117/C.1/L.48)

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[34] Article 30 is numbered 32 in the Convention as adopted.

[35] Article 31 is numbered 33 in the Convention as adopted.

[36] Pakistan submitted, in connection with article 31, a document (A/CONF.117/C.1/L.11) which read as follows:

The terminology "any other subject of international law" requires clarification.

[37] In the original version the words "in conformity with international law" were preceded by the words "in good faith and".

[38] Article 32 is numbered 34 in the Convention as adopted.

Add the words "Subject to the provisions of article 34", before the words "a succession of States entails . . .".

[Withdrawn; see para. 191 below.]

(b) *Kenya* (A/CONF.117/C.1/L.55)

Replace the words "A succession of States entails" by the words "The passing of State debts entails".

The rest of the article remains the same.

[Withdrawn; see para. 191 below.]

C. Proposals for a new article 31 *bis*

187. In addition, the Committee had before it amendments seeking to insert a new article 31 *bis* before article 32 as follows:

(a) *United States of America* (A/CONF.117/C.1/L.47)

Article 31 bis. *Passing of State debts*

A succession of States has the effect of making the State debts of the predecessor State pass to the succe: sor State in accordance with the provisions of the articles of the present Part.

[Withdrawn; see para. 191 below.]

(b) *Greece* (A/CONF.117/C.1/L.53)

Article 31 bis. *Passing of State debts*

The provisions of article 8 *bis* concerning the passing of State property apply *mutatis mutandis* to State debts to the extent that such debts pass from the predecessor State to the successor State in accordance with the provisions of the present Part.

[Withdrawn; see para. 191 below.]

D. Proceedings of the Committee of the Whole

188. The Committee considered article 32 and the amendments thereto, together with the proposed article 31 *bis*, at its 34th meeting on 25 March 1983, 39th meeting on 29 March 1983, 40th meeting on 30 March 1983 and 42nd meeting on 31 March 1983.

189. At its 40th meeting, the Committee established a Working Group to examine article 8 *bis*, article 32 and the amendments thereto, as well as proposed new articles 19 *bis* and 31 *bis*. This Working Group was chaired by the representative of Morocco and consisted of the sponsors of amendments and other interested delegations.

190. At its 42nd meeting, the Committee had before it the report of the Working Group (A/CONF.117/C.1/L.62) which read as follows:

Article 32 should be replaced by the following:

Effects of the passing of State debts

The passing of State debts entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State subject to the provisions of the articles in the present Part.

The initial change, namely the replacement of the words "A succession of States entails" by the words "The passing of State debts entails" applies also to articles 9 and 20. Similarly, the replacement of the words "in accordance with" by the words "subject to" likewise applies to articles 9 and 20.

This proposal implies the deletion of article 8 *bis* and the withdrawal of the proposed amendments concerning articles 19 *bis* and 31 *bis* and the amendments to article 32 proposed by the Netherlands (A/CONF.117/C.1/L.48) and Kenya (A/CONF.117/C.1/L.55) respectively.

191. At the same meeting, the Committee approved the above report, which implied the withdrawal of the amendments to article 32 submitted by the Netherlands (A/CONF.117/C.1/L.48) and Kenya (A/CONF.117/C.1/L.55) as well as the amendments seeking to insert a new article 31 *bis* submitted by the United States of America (A/CONF.117/C.1/L.47) and Greece (A/CONF.117/C.1/L.53). The Committee referred the text of article 32 to the Drafting Committee.[4]

ARTICLE 33[39]

A. International Law Commission text

192. The International Law Commission text provided as follows:

Article 33. Date of the passing of State debts

Unless otherwise agreed or decided, the date of the passing of State debts is that of the succession of States.

B. Amendments

193. An amendment was submitted to the article by *Egypt*, *Kenya* and the *Netherlands* (A/CONF.117/C.1/L.49).

194. This amendment was to the following effect:

Replace the words "Unless otherwise agreed or decided" by the words "Unless otherwise agreed by the States concerned or decided by an appropriate international body . . .".

[Adopted; see para. 196 below.]

C. Proceedings of the Committee of the Whole

195. The Committee considered the article at its 35th meeting on 25 March 1983.

196. At that meeting, the Committee adopted without a vote the amendment submitted by Egypt, Kenya and the Netherlands. It then adopted the text of the International Law Commission for article 33, as amended, and referred it to the Drafting Committee.[4]

ARTICLE 34[40]

A. International Law Commission text

197. The International Law Commission text provided as follows:

Article 34. Effects of the passing of State debts with regard to creditors

1. A succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State, an international organization or any other subject of international law asserting a claim unless:

(*a*) the consequences of that agreement are in accordance with the provisions of the present Part; or

[39] Article 33 is numbered 35 in the Convention as adopted.
[40] Article 34 is numbered 36 in the Convention as adopted.

(*b*) the agreement has been accepted by that third State, international organization or other subject of international law.

B. Amendments

198. An amendment to the article was submitted by *Pakistan* (A/CONF.117/C.1/L.12).

199. This amendment was to the following effect:

Delete paragraph 2(*a*).

[Withdrawn; reintroduced by Switzerland but not put to the vote, see para. 203 below.]

C. Proceedings of the Committee of the Whole

200. The Committee initially considered the article at its 35th, 38th and 39th meetings on 25 and 29 March 1983.

201. At the 38th meeting the amendment submitted by Pakistan was withdrawn by its sponsor and reintroduced orally by Switzerland.

202. At the 39th meeting an oral amendment seeking to delete paragraph 2 was submitted by the Syrian Arab Republic.

203. At the same meeting, the Committee adopted the oral amendment submitted by the Syrian Arab Republic by 38 votes to 6, with 28 abstentions. As a result, the oral amendment submitted by Switzerland was not put to the vote.

204. The Committee then adopted the International Law Commission text for article 34, as amended, by 61 votes to none, with 11 abstentions and referred it to the Drafting Committee.[4]

ARTICLE 35[41]

A. International Law Commission text

205. The International Law Commission text provided as follows:

Article 35. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

B. Amendments

206. Amendments to the article were submitted by Pakistan and by the Syrian Arab Republic.

207. These amendments were to the following effect:

(a) *Pakistan* (A/CONF.117/C.1/L.13)

In paragraph 2, delete the words "in an equitable proportion".

[Rejected; see para. 210 below.]

(b) *Syrian Arab Republic* (A/CONF.117/C.1/L.38)

Add the following at the end of paragraph 2: "and the capacity of the newly independent successor State, but without encumbering it".

[Withdrawn; see para. 209 below.]

C. Proceedings of the Committee of the Whole

208. The Committee considered the article at its 35th meeting on 25 March 1983.

209. At that meeting the amendment submitted by the Syrian Arab Republic was withdrawn.

210. At the same meeting, the Committee rejected the amendment submitted by Pakistan by 40 votes to 1, with 18 abstentions. It then adopted the text of the International Law Commission for article 35 by 57 votes to none, with 5 abstentions and referred it to the Drafting Committee.[4]

ARTICLE 36[42]

A. International Law Commission text

211. The International Law Commission text provided as follows:

Article 36. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

B. Amendments

212. Amendments were submitted to the article by Greece and Italy.

213. These amendments were to the following effect:

(a) *Greece* (A/CONF.117/C.1/L.51)

Replace paragraph 2 by the following:

2. The agreement referred to in paragraph 1 shall pay regard to the principle of the permanent sovereignty of every people and of every State over its wealth and natural resources in accordance with international law.

[Rejected; see para. 216 below.]

(b) *Italy* (A/CONF.117/C.1/L.52)

Redraft paragraph 1 as follows:

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, except those relating to public works in the process of execution in the territory of the successor State and any other debts passing to the successor State in virtue of an agreement between the newly independent State and the predecessor State, in view of the link between the State debt of the predecessor State connected with

[41] Article 35 is numbered 37 in the Convention as adopted.

[42] Article 36 is numbered 38 in the Convention as adopted.

its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

[Withdrawn; see para. 215 below.]

C. Proceedings of the Committee of the Whole

214. The Committee considered the article at its 35th, 36th and 37th meetings, on 25 and 28 March 1983.

215. At the 37th meeting the amendment submitted by Italy was withdrawn.

216. At the same meeting, the Committee rejected the amendment submitted by Greece by 33 votes to 21, with 3 abstentions. It then adopted the text of the International Law Commission for article 36 by 39 votes to 21 with no abstentions, and referred it to the Drafting Committee.[4]

ARTICLE 37[43]

A. International Law Commission text

217. The International Law Commission text provided as follows:

Article 37. Uniting of States

When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

B. Amendments

218. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

219. The Committee considered the article at its 37th meeting on 28 March 1983.

220. At that meeting, the Committee adopted the text of the International Law Commission for article 37 without a vote and referred it to the Drafting Committee.[4]

ARTICLE 38[44]

A. International Law Commission text

221. The International Law Commission text provided as follows:

Article 38. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account all relevant circumstances.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

B. Amendments

222. Amendments were submitted to the article, in written form, by Pakistan and, orally, by France.

223. These amendments were to the following effect:

(a) *Pakistan* (A/CONF.117/C.1/L.14)

In paragraph 1, replace the last phrase, starting with the words "in an equitable proportion" by the phrase "taking into account, *inter alia*, the property, rights and interests [or State property as defined in article 8] which pass to the successor State in relation to that State debt."

[Withdrawn; see para. 225 below.]

(b) *France* (Oral amendment)

In paragraph 1, replace the words "taking into account all relevant circumstances" by the words "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt".

[Adopted; see para. 226 below.]

C. Proceedings of the Committee of the Whole

224. The Committee considered article 38 at its 37th meeting on 28 March 1983.

225. At that meeting the amendment submitted by Pakistan was withdrawn.

226. At the same meeting, the Committee adopted the oral amendment submitted by France by 29 votes to 9, with 26 abstentions. It then adopted the International Law Commission text for article 38, as amended, by 60 votes to none, with 2 abstentions and referred it to the Drafting Committee.[4]

ARTICLE 39[45]

A. International Law Commission text

227. The International Law Commission text provided as follows:

Article 39. Dissolution of a State

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account all relevant circumstances.

B. Amendments

228. Amendments to the article were submitted, in writing, by Pakistan and, orally, by Switzerland.

229. These amendments were to the following effect:

(a) *Pakistan* (A/CONF.117/C.1/L.15)

Delete the words "in equitable proportions,".

[Withdrawn; see para. 231 below.]

(b) *Switzerland* (Oral amendment)

Replace the words "taking into account all relevant circumstances" by the words "taking into account, *inter alia*, the property, rights and interests which pass to the successor States in relation to that State debt."

[Adopted; see para. 232 below.]

C. Proceedings of the Committee of the Whole

230. The Committee considered the article at its 37th meeting on 28 March 1983.

[43] Article 37 is numbered 39 in the Convention as adopted.
[44] Article 38 is numbered 40 in the Convention as adopted.
[45] Article 39 is numbered 41 in the Convention as adopted.

231. At that meeting the amendment submitted by Pakistan was withdrawn.

232. At the same meeting, the Committee adopted the oral amendment submitted by Switzerland by 25 votes to 17, with 20 abstentions. It then adopted the International Law Commission text for article 39, as amended, by 62 votes to none, with 2 abstentions, and referred it to the Drafting Committee.[4]

PART I. GENERAL PROVISIONS[46]

ARTICLE 1

A. International Law Commission text

233. The International Law Commission text provided as follows:

Article 1. Scope of the present articles

The present articles apply to the effects of a succession of States in respect of State property, archives and debts.

B. Amendments

234. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

235. The Committee considered the article at its 40th meeting on 30 March 1983.

236. At that meeting, the Committee considered the possibility, suggested by the representative of Greece, of merging articles 7, 18 and 30 with article 1.

237. It voted on the principle of such a merger, which it rejected by 42 votes to 20, with 3 abstentions. It then adopted the text of the International Law Commission for article 1 by 51 votes to 3, with 14 abstentions and referred it to the Drafting Committee.[4]

ARTICLE 2

A. International Law Commission text

238. The International Law Commission text provided as follows:

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*d*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*e*) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(*f*) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

B. Amendment

239. An amendment to the article was submitted by the *United Kingdom of Great Britain and Northern Ireland* (A/CONF.117/C.1/L.56).

240. This amendment was to the following effect:

Add the following at the end of paragraph 2:

In particular, where there exists, in accordance with established constitutional usages, a legally separate Government of the territory to which the succession of States relates, then that Government shall, to the extent that it has undertaken the functions regulated by the provisions of this Convention, be treated for the purposes of the present articles as if it were the predecessor State. To the extent that the State responsible for the international relations of the dependent territory has undertaken the functions regulated by the provisions of this Convention, it shall be treated as the predecessor State.

[Withdrawn; see para. 242 below.]

C. Proceedings of the Committee of the Whole

241. The Committee considered the article and the amendment thereto at its 41st meeting on 30 March 1983.

242. At the 41st meeting the amendment submitted by the United Kingdom was withdrawn.

243. At the same meeting, the Committee adopted the article by 59 votes to none, with 9 abstentions and referred it to the Drafting Committee.

244. The Committee also requested the Drafting Committee to consider the desirability of including in article 2 the definitions of State property, State archives and State debts, contained in articles 8, 19 and 31.[4]

ARTICLE 3

A. International Law Commission text

245. The International Law Commission text provided as follows:

Article 3. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

B. Amendments

246. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

247. The Committee considered the article at its 40th meeting on 30 March 1983.

248. At that meeting, it adopted the International Law Commission text for article 3 without a vote and referred it to the Drafting Committee.[4]

[46] See the editorial note at the beginning of chapter II.

ARTICLE 4

A. International Law Commission text

249. The International Law Commission text provided as follows:

Article 4. Temporal application of the present articles

1. Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the articles apply only in respect of a succession of States which has occurred after the entry into force of the articles except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present articles or at any time thereafter, make a declaration that it will apply the provisions of the articles in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other contracting State or State Party to the articles which makes a declaration accepting the declaration of the successor State. Upon the entry into force of the articles as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the articles shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present articles make a declaration that it will apply the provisions of the articles provisionally in respect of its own succession of States which has occurred before the entry into force of the articles in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present articles of the communication to him of that notification and of its terms.

B. Amendments

250. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

251. The Committee considered the article at its 40th meeting on 30 March 1983.

252. At that meeting, it adopted the International Law Commission text for article 4 without a vote and referred it to the Drafting Committee.[4]

ARTICLE 5

A. International Law Commission text

253. The International Law Commission text provided as follows:

Article 5. Succession in respect of other matters

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present articles.

B. Amendments

254. No amendment was submitted to the article.

C. Proceedings of the Committee of the Whole

255. The Committee considered the article at its 40th and 41st meetings on 30 March 1983.

256. At its 41st meeting, the Committee adopted the International Law Commission text for article 5 without a vote and referred it to the Drafting Committee.[4]

ARTICLE 6

A. International Law Commission text

257. The International Law Commission text provided as follows:

Article 6. Rights and obligations of natural or juridical persons

Nothing in the present articles shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

B. Amendment

258. An amendment was submitted to the article by the *Syrian Arab Republic* (A/CONF.117/C.1/L.36).

259. This amendment was to the following effect:

Add the following at the end of article 6:

especially the rights of national liberation movements to request that measures be taken to safeguard the rights of the peoples they represent, in the light of the right of self-determination and the principle of permanent sovereignty of every people over its wealth and natural resources.

[Withdrawn; see para. 261 below.]

C. Proceedings of the Committee of the Whole

260. The Committee considered the article at its 40th meeting on 30 March 1983.

261. At that meeting, the amendment submitted by the Syrian Arab Republic was withdrawn.

262. At the same meeting, the Committee adopted the International Law Commission text for the article without a vote and referred it to the Drafting Committee.[4]

PROPOSAL FOR A NEW ARTICLE 6 *bis*

A. Text of the proposed new article

263. An amendment seeking to insert a new article 6 *bis* after article 6 was submitted by *Brazil* (A/CONF.117/C.1/L.43).

264. The proposed new article read as follows:

The present Convention and permanent sovereignty over natural wealth and resources

Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources and their inalienable right to information about their history and cultural heritage.

[Withdrawn; see para. 266 below.]

B. Proceedings of the Committee of the Whole

265. The Committee considered the amendment at its 40th meeting on 30 March 1983.

266. At that meeting, the amendment was withdrawn.

PROPOSAL FOR A NEW ARTICLE ENTITLED "RIGHTS OF NATIONAL ORGANIZATIONS TO REQUEST THAT SAFEGUARD MEASURES BE TAKEN"

A. Text of the proposed new article

267. A proposal for a new article entitled "Rights of national organizations to request that safeguard measures be taken" was submitted by the Syrian Arab Republic (A/CONF.117/C.1/L.60/Rev.1).[47]

268. The proposed new article read as follows:

Rights of national organizations to request that safeguard measures be taken

No provision in the present Convention is considered as affecting the right of any people represented by an organization recognized by the United Nations and any international regional organization to request measures to safeguard their rights in the light of the right of self-determination and the principle of permanent sovereignty of every people over its wealth and natural resources.

[Not put to the vote; see para. 270 below.]

B. Proceedings of the Committee of the Whole

269. The Committee considered the proposed new article at its 42nd, 43rd and 44th meetings held on 31 March and 5 April 1983.

270. The proposed new article was not put to a vote.[48]

PROPOSALS FOR NEW ARTICLES CONCERNING THE SETTLEMENT OF DISPUTES ARISING FROM THE INTERPRETATION OR APPLICATION OF THE FUTURE CONVENTION[49]

A. Text of the proposals

271. Proposals for new articles concerning the settlement of disputes arising from the interpretation or application of the future convention were submitted by Denmark and the Netherlands and by Kenya and Mozambique.

272. The proposals submitted by *Denmark* and the *Netherlands* read as follows:

Proposal for a new article
(A/CONF.117/C.1/L.25/Rev.1/Corr.1)

(Settlement of disputes)

1. If a dispute arises regarding the interpretation or application of this Convention, the parties to the dispute shall seek to resolve it by a process of consultation and negotiation upon the request of any of them.

2. If the dispute is not resolved as a result of the process of consultation and negotiation referred to in paragraph 1 within [three months] of its inception, any State participating in the process may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree upon other means of settlement.

3. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 2. The other States shall not be bound by paragraph 2 with respect to any State which has made such a declaration.

4. When a dispute regarding the interpretation or application of this Convention includes a State which has made a declaration under paragraph 3, if the dispute is not settled by negotiation or by other agreed means, any one of the parties to the dispute may, by a request addressed to the other party, submit it to arbitration in conformity with the Annex to this Convention.

5. Any State which has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the depositary.

[Rejected; see para. 275 below.]

Proposal for an Annex to the Convention
(A/CONF.117/C.1/L.57)

(Arbitration)

1. Arbitration procedure, unless the parties to the dispute decide otherwise, shall be in accordance with the rules set out in this Annex.

2. The arbitration tribunal shall consist of three members: one arbitrator nominated by each of the parties to the dispute, and a third arbitrator who shall be nominated by agreement between the two first-named, and shall act as its chairman.

3. If, at the end of a period of 60 days from the nomination of the second arbitrator, the chairman of the tribunal has not been nominated, the Secretary-General of the United Nations upon request of either party to the dispute shall proceed to such nomination.

4. If, at the end of a period of 60 days from the date of the receipt of the request for arbitration, one of the parties to the dispute has not nominated the member of the tribunal for whose designation it is responsible, the other party may directly inform the Secretary-General of the United Nations who shall nominate the chairman of the tribunal.

5. The chairman of the tribunal shall, upon nomination in accordance with paragraph 4, request the party which has not provided an arbitrator, to do so within a period of 60 days. If the party does not make the required nomination, the chairman of the tribunal shall so inform the Secretary-General of the United Nations who shall make the nomination.

6. The chairman of the tribunal, if nominated under the provisions of paragraph 3 or 4, shall not be or have been a national of one of the parties to the dispute, except with the consent of the other party.

7. In the case of the decease or default of an arbitrator for whose nomination one of the parties is responsible, the said party shall nominate a replacement within a period of 60 days from the date of decease or default. Should the said party not make the nomination, the arbitration shall continue under the remaining arbitrators. In the case of decease or default of the chairman of the tribunal, a replacement shall be nominated in accordance with the provisions of paragraph 2 above or, in the absence of agreement between the members of the tribunal within a period of 60 days of the decease or default, according to the provisions of paragraph 3. The arbitration is continued as soon as the new chairman has been nominated.

8. If a procedure has been initiated between two parties to a dispute, any other Contracting State the interests of which are affected may join in the arbitration procedure by giving written notice to the parties which have originally initiated the procedure unless either of the latter parties object to such joinder.

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[47] As originally submitted (A/CONF.117/C.1/L.60), the proposed new article read as follows:

Rights of national liberation movements to request that safeguard measures be taken

No provision in the present Convention shall be considered as affecting the right of national liberation movements recognized by the United Nations and any international regional organization to request that measures be taken to safeguard the rights of the peoples they represent, in the light of the right of self-determination and the principle of permanent sovereignty of every people over its wealth and natural resources.

[48] A draft resolution on the question (A/CONF.117/L.1) was submitted to the Conference at its 10th plenary meeting on 7 April 1983 and was adopted by 45 votes to 1, with 25 abstentions. For the text of the draft resolution, see section F of this volume.

[49] At its 10th plenary meeting on 7 April 1983 the Conference decided that articles A to E on the settlement of disputes should constitute Part V of the future Convention, the Annex being appended at the very end of the Convention. Articles A, B, C, D and E on the settlement of disputes accordingly became articles 42, 43, 44, 45 and 46 respectively of the Convention as adopted.

9. An arbitration tribunal established under the provisions of the present Annex shall decide its own rules of procedure.

10. Decisions of the tribunal both as to its procedure and its place of meeting as to any controversy laid before it, shall be taken by majority vote of its members; the absence or abstention of one of the members for whose nomination the parties to the dispute were responsible shall not constitue an impediment to the tribunal reaching a decision. In cases of equal voting, the chairman shall cast the deciding vote.

11. Absence or default of one party to the dispute shall not constitute an impediment to the procedure.

12. The award of the tribunal shall be final and binding on the parties to the dispute.

13. Any controversy which may arise between the parties to the dispute as regards interpretation and execution of the award may be submitted by either party for judgement to the tribunal which made the award, or, if it is not available, to another tribunal constituted for this purpose in the same manner as the original tribunal.

[Not put to the vote; see para. 275 below.]

273. The proposal submitted by *Kenya* and *Mozambique* read as follows:

Proposal for new articles
(A/CONF.117/C.1/L.58)[49]

Article A. Consultation and negotiation

If a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article B. Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article A has been made, any party to the dispute may submit it to the conciliation procedure specified in the Annex to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article C. Judicial settlement and arbitration

Any State at the time of signature or ratification of the present Convention or accession thereto or at any time thereafter, may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures refferred to in articles A and B, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

Article D. Settlement by common consent

Notwithstanding articles A, B and C, if a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

Article E. Other provisions in force for the settlement of disputes

Nothing in articles A to D shall affect the rights or obligations of the Parties to the present Convention under any provisions in force binding them with regard to the settlement of disputes.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article B, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present Convention to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

[Adopted; see para. 276 below.]

B. Proceedings of the Committee of the Whole

274. The Committee considered the proposals submitted by Denmark and the Netherlands (A/CONF.117/C.1/L.25/Rev.1/Corr.1 and A/CONF.117/C.1/L.57) and by Kenya and Mozambique (A/CONF.117/C.1/L.58) at its 43rd and 44th meetings on 31 March and 5 April 1983.

275. At its 44th meeting, the Committee rejected the proposal for a new article submitted by Denmark and the Netherlands by 36 votes to 21, with 10 abstentions. As a result, the proposal for an Annex submitted by those countries was not put to the vote.

276. At the same meeting, the Committee adopted the proposal for new articles submitted by Kenya and Mozambique by 50 votes to 2, with 13 abstentions, and referred it to the Drafting Committee.[50]

[50] The report of the Drafting Committee on this proposal is contained in document A/CONF/117/10/Add.2.

Chapter III

FINAL CLAUSES[51]

277. A proposal for the final articles of the future Convention was submitted by *Brazil* (A/CONF.117/C.1/L.24).

278. The proposal read as follows:

PART . . .

FINAL CLAUSES

Article A. Signature

The present Convention shall be open for signature by all States until 31 December 1983 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1984, at United Nations Headquarters in New York.

Article B. Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article C. Accession

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article D. Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article E. Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this . . . day of April, one thousand nine hundred and eighty-three.

279. As indicated in paragraph 10 of this report, the Committee of the Whole entrusted the Drafting Committee with the preparation of drafts, for submission directly to the Conference in plenary meeting, concerning the preamble and the final clauses of the future Convention. In accordance with that decision, the above proposal submitted by Brazil was considered by the Drafting Committee.[52]

[51] At its 10th plenary meeting, on 7 April 1983, the Conference decided that articles A to E containing the final provisions of the future Convention should form a separate Part VI to be placed at the end of the Convention. Articles A, B, C, D and E accordingly became articles 47, 48, 49, 50 and 51 respectively of the Convention as adopted.

[52] For the report of the Drafting Committee on this proposal, see document A/CONF.117/10.

D. TITLES AND TEXTS OF ARTICLES 15, 23 AND 27 ADOPTED BY THE COMMITTEE OF THE WHOLE[1]

DOCUMENT A/CONF.117/10/ADD.1

[*Original: Arabic/English/French/Russian/Spanish*]
[*31 March 1983*]

Article 15. Uniting of States

When two or more States unite and so form one successor State, the State property of the predecessor States shall pass to the successor State.

Article 23. Absence of effect of a succession of States on the archives of a third State

A succession of States shall not as such affect archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Article 27. Uniting of States

When two or more States unite and so form one successor State, the State archives of the predecessor States shall pass to the successor State.

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[1] See the decision of the Committee of the Whole recorded in paragraphs 9, 11 and 12 of its report (sect. C of this volume).

E. TEXTS SUBMITTED DIRECTLY TO THE CONFERENCE IN PLENARY MEETING BY THE DRAFTING COMMITTEE IN ACCORDANCE WITH THE DECISIONS TAKEN BY THE CONFERENCE[1]

1. Title of the Convention, titles of Parts I to V and sections thereof and titles and texts of articles 1 to 12, 12 *bis*, 13, 14, 16 to 22, 24, 24 *bis*, 25, 26, 28 to 39 and A to E (Final provisions)

DOCUMENT A/CONF.117/10

[*Original: Arabic/English/French/Russian/Spanish*]
[*1 April 1983*]

VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS

* * *

PART I. GENERAL PROVISIONS

Article 1. Scope of the present Convention

The present Convention applies to the effects of a succession of States in respect of State property, archives and debts.

Article 2. Use of terms

1. For the purposes of the present Convention:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*d*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*e*) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(*f*) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3. Cases of succession of States covered by the present Convention

The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Article 4. Temporal application of the present Convention

1. Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of a succession of States would be subject under international law independently of the Convention, the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present Convention or at any time thereafter, make a declaration that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other contracting State or State Party to the Convention which makes a declaration accepting the declaration of the successor State. Upon the entry into force of the Convention as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the Convention shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present Convention make a declaration that it will apply the provisions of the Convention provisionally in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present Convention of the communication to him of that notification and of its terms.

[1] See the decision of the Committee of the Whole recorded in paragraphs 10 and 11 of its report (sect. C of this volume). For the numbering in the Convention as adopted of articles 12 *bis* to 39, see the footnotes to the commentary on the individual articles in the report of the Committee of the Whole (*ibid.*); for the numbering of articles A to E (Final clauses) see footnote 51 and for that of articles A to E (Settlement of disputes) see footnote 49 to that report.

Article 5. Succession in respect of other matters

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention.

Article 6. Rights and obligations of natural or juridical persons

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

PART II. STATE PROPERTY

Section 1. Introduction

Article 7. Scope of the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State property of the predecessor State.

Article 8. State property

For the purposes of the articles in the present Part, "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 9. Effects of the passing of State property

The passing of State property entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to the State property which passes to the successor State, subject to the provisions of the articles in the present Part.

Article 10. Date of the passing of State property

Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State property of the predecessor State is that of the succession of States.

Article 11. Passing of State property without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed by the States concerned or decided by an appropriate international body, the passing of State property of the predecessor State to the successor State shall take place without compensation.

Article 12. Absence of effect of a succession of States on the property of a third State

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Article 12 bis. Preservation and safety of State property

For the purpose of the implementation of the provisions of the articles in the present Part, the predecessor State shall take all measures to prevent damage or destruction to State property which passes to the successor State in accordance with those provisions.

Section 2. Provisions concerning specific categories of succession of States

Article 13. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Article 14. Newly independent State

1. When the successor State is a newly independent State:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) immovable property, having belonged to the territory to which the succession of States relates, situated outside it and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*c*) immovable State property of the predecessor State other than that mentioned in subparagraph (*b*) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(*d*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*e*) movable property, having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*f*) movable State property of the predecessor State, other than the property mentioned in subparagraphs (*d*) and (*e*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property of the predecessor State otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 16. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a successor State, and unless the predecessor State and the successor State otherwise agree:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property of the predecessor State, other than that mentioned in subparagraph (*b*), shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States.

Article 17. Dissolution of a State

1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States concerned otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions;

(*c*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(*d*) movable State property of the predecessor State, other than that mentioned in subparagraph (*c*), shall pass to the successor States in equitable proportions.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation among the successor States that may arise as a result of a succession of States.

PART III. STATE ARCHIVES

Section 1. Introduction

Article 18. Scope of the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State archives of the predecessor State.

Article 19. State archives

For the purposes of the articles in the present Part, "State archives of the predecessor State" means all documents of whatever date and kind, produced or received by the predecessor State in the exercise of its functions which, at the date of the succession of States, belonged to the predecessor State according to its internal law and were preserved by it directly or under its control as archives for whatever purpose.

Article 20. Effects of the passing of State archives

The passing of State archives entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to the State archives which pass to the successor State, subject to the provisions of the articles in the present Part.

Article 21. Date of the passing of State archives

Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State archives of the predecessor State is that of the succession of States.

Article 22. Passing of State archives without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed by the States concerned or decided by an appropriate international body, the passing of State archives of the predecessor State to the successor State shall take place without compensation.

Article 24. Preservation of the integral character of groups of State archives

Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the integral character of groups of State archives of the predecessor State.

Article 24 bis. *Preservation and safety of State archives*

For the purpose of the implementation of the provisions of the articles in the present Part, the predecessor

State shall take all measures to prevent damage or destruction to State archives which pass to the successor State in accordance with those provisions.

Section 2. Provisions concerning specific categories of succession of States

Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives of the predecessor State which have passed to the successor State in accordance with paragraph 1 or 2.

Article 26. Newly independent State

1. When the successor State is a newly independent State:

(*a*) archives having belonged to the territory to which the succession of States relates and having become State archives of the predecessor State during the period of dependence shall pass to the newly independent State;

(*b*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State;

(*c*) the part of State archives of the predecessor State, other than the parts mentioned in subparagraphs (*a*) and (*b*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, other than those mentioned in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives of the predecessor State.

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

Article 28. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to the successor State pursuant to other provisions of the present article.

3. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of

the peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them or on an exchange basis, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

Article 29. Dissolution of a State

1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States concerned otherwise agree:

(*a*) the part of the State archives of the predecessor State which should be in the territory of a successor State for normal administration of its territory shall pass to that successor State;

(*b*) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory of a successor State shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State, or on an exchange basis, appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

PART IV. STATE DEBTS

Section 1. Introduction

Article 30. Scope of the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

Article 31. State debt

For the purposes of the articles in the present Part, "State debt" means any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law.

Article 32. Effects of the passing of State debts

The passing of State debts entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of the State debts which pass to the successor State, subject to the provisions of the articles in the present Part.

Article 33. Date of the passing of State debts

Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State debts of the predecessor State is that of the succession of States.

Article 34. Absence of effect of a succession of States on creditors

A succession of States does not as such affect the rights and obligations of creditors.

Section 2. Provisions concerning specific categories of succession of States

Article 35. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt.

Article 36. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between them provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

Article 37. Uniting of States

When two or more States unite and so form one successor State, the State debt of the predecessor States shall pass to the successor State.

Article 38. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless

the predecessor State and the successor State otherwise agree, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

Article 39. Dissolution of a State

When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State debt.

PART V. FINAL PROVISIONS

Article A. Signature

The present Convention shall be open for signature by all States until 31 December 1983 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1984, at United Nations Headquarters in New York.

Article B. Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article C. Accession

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article D. Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article E. Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this eighth day of April, one thousand nine hundred and eighty-three.

2. Preamble[1]

DOCUMENT A/CONF.117/10/ADD.3

[Original: Arabic/English/French/Russian/Spanish]
[6 April 1983]

The States Parties to the present Convention,

Considering the profound transformation of the international community brought about by the decolonization process,

Considering also that other factors may lead to cases of succession of States in the future,

Convinced in these circumstances of the need for the codification and progressive development of the rules relating to succession of States in respect of State property, archives and debts as a means for ensuring greater juridical security in international relations,

Noting that the principles of free consent, good faith and *pacta sunt servanda* are universally recognized,

Emphasizing the importance of the codification and progressive development of international law which is of interest of the international community as a whole and of special importance for the strengthening of peace and international co-operation,

Believing that questions relating to succession of States in respect of State property, archives and debts are of special importance to all States,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force, and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Recalling that respect for the territorial integrity and political independence of any State is required by the Charter of the United Nations,

Bearing in mind the provisions of the 1969 Vienna Convention on the Law of Treaties[2] and the 1978 Vienna Convention on Succession of States in Respect of Treaties[3],

Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

Have agreed as follows:

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[1] See the decision of the Committee of the Whole recorded in paragraph 10 of its report (sect. C of this volume).

[2] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

[3] For the text of the Convention, see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 185.

3. Titles and texts of articles A to E and Annex (Settlement of disputes)[1]

DOCUMENT A/CONF.117/10/ADD.2

[Original: Arabic/English/French/Russian/Spanish]
[5 April 1983]

PART . . .

SETTLEMENT OF DISPUTES

Article A. Consultation and negotiation

If a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article B. Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article A has been made, any party to the dispute may submit it to the conciliation procedure specified in the Annex to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article C. Judicial settlement and arbitration

Any State at the time of signature or ratification of the present Convention or accession thereto or at any time thereafter, may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles A and B, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

Article D. Settlement by common consent

Notwithstanding articles A, B and C, if a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

Article E. Other provisions in force for the settlement of disputes

Nothing in articles A to D shall affect the rights or obligations of the Parties to the present Convention under any provisions in force binding them with regard to the settlement of disputes.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article B, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present Convention to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

[1] See the decision of the Committee of the Whole recorded in paragraph 11 of its report (sect. C of this volume). See also footnote 49 to the report of the Committee of the Whole for the numbering of articles A to E (Settlement of disputes) in the Convention as adopted.

4. Final Act of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts

DOCUMENT A/CONF.117/13[1]

[*Original: Arabic/English/French/Russian/Spanish*]
[*6 April 1983*]

1. The General Assembly of the United Nations, by resolution 36/113 of 10 December 1981 decided to convene a conference of plenipotentiaries early in 1983 to consider the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission at its thirty-third session[2] and to embody the results of its work in an international convention and such other instruments as it might deem appropriate.

2. Subsequently, by resolution 37/11 of 15 November 1982, the General Assembly, after noting, *inter alia*, that the Government of Austria had extended an invitation to hold the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts at Vienna, decided that the Conference was to be held from 1 March to 8 April 1983 in that city.

3. The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts met at the Neue Hofburg in Vienna from 1 March to 8 April 1983.

4. The General Assembly, by resolution 37/11 requested the Secretary-General to invite all States to participate in the Conference. The delegations of ninety States participated in the Conference, as follows: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Democratic Yemen, Denmark, Ecuador, Egypt, Finland, France, Gabon, German Democratic Republic, Germany, Federal Repuplic of, Greece, Guatemala, Holy See, Honduras, Hungary, India, Indonesia, Iran, Islamic Republic of, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Kuwait, Lebanon, Libyan Arab Jamahiriya, Luxembourg, Malaysia, Mali, Mauritania, Mexico, Morocco, Mozambique, Netherlands, Nicaragua, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, San Marino, Saudi Arabia, Senegal, Seychelles, Spain, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia and Zaire.

5. Also pursuant to General Assembly resolution 37/11 the Secretary-General invited Namibia, represented by the United Nations Council for Namibia, to participate in the Conference in accordance with General Assembly resolution 36/121 of 10 December 1981. Namibia, represented by the United Nations Council for Namibia, participated in the Conference.

6. By resolution 37/11 the General Assembly also requested the Secretary-General to invite to the Conference representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices, in the capacity of observers, in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976. The following organization, having received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices, was represented at the Conference by an observer:

Palestine Liberation Organization

7. Pursuant to General Assembly resolution 37/11 the Secretary-General invited to the Conference representatives of the national liberation movements recognized in its area by the Organization of African Unity, to participate as observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974. The following national liberation movements were represented at the Conference:

African National Congress

Pan Africanist Congress

8. The General Assembly, by resolution 37/11 requested the Secretary-General to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested intergovernmental organizations, to be represented at the Conference by observers. The following intergovernmental organizations were represented at the Conference by observers:

Specialized and related agencies

United Nations Educational, Scientific and Cultural Organization

World Bank

Other intergovernmental organizations

Asian-African Legal Consultative Committee

European Economic Community

9. The Conference elected Mr. Ignaz Seidl-Hohenveldern (Austria) as President.

10. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Bulgaria, Chile, Ecuador, Egypt, France, German Democratic Republic, India, Indonesia, Italy, Morocco, Nigeria, Norway, Pakistan, Suriname, Switzerland, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Zaire.

11. The following committees were set up by the Conference:

General Committee

Chairman: The President of the Conference

[1] Document A/CONF.117/13 was submitted directly to the Conference in plenary by the Drafting Committee pursuant to the decision of the Committee of the Whole recorded in paragraph 11 of its report (sect. C of this volume).

[2] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 10* (A/36/10 and Corr.1, chapter II, sect. D).

Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

Committee of the Whole

Chairman: Mr Milan Šahović (Yugoslavia)

Vice-Chairman: Mr. Moncef Benouniche (Algeria)

Rapporteur: Mrs. Kuljit Thakore (India)

Drafting Committee

Chairman: Mr. Sompong Sucharitkul (Thailand)

Members: The Chairman of the Drafting Committee, and the representatives of Algeria, Argentina, France, Greece, Iraq, Japan, Kenya, Nigeria, Poland, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela, subsequently replaced by Cuba

The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 47 of the rules of procedure of the Conference.

Credentials Committee

Chairman:

Members: The representatives of Belgium, Brazil, Japan, Kenya, Kuwait, Nicaragua, Senegal, United States of America and Union of Soviet Socialist Republics

12. Mr. Mohammed Bedjaoui, Judge of the International Court of Justice and the International Law Commission's Special Rapporteur on Succession of States in respect of matters other than treaties, was the Expert Consultant.

13. The Secretary-General of the United Nations was represented by Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel; Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs of the United Nations, acted as Executive Secretary. The Secretariat was further composed as follows: Secretaries of the Committee of the Whole, Miss J. Dauchy and Mr. E. Valencia-Ospina; Assistant Secretaries of the Committee of the Whole, Mr. A. O. Adede, Mr. L. D. Johnson and Mr. S. Shestakov; Secretary of the Drafting Committee, Mr. E. Valencia-Ospina; Assistant Secretary of the Drafting Committee, Mr. L. D. Johnson, and Secretary of the Credentials Committee, Mr. P. Neumann.

14. The General Assembly, by its resolution 37/11 referred to the Conference as the basic proposal for its consideration the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission at its thirty-third session.

15. The Conference also had before it written comments of Governments on the final draft articles on succession of States in respect of State property, archives and debts submitted pursuant to General Assembly resolution 36/113 of 10 December 1981, as well as comments made orally on the draft articles in the Sixth Committee of the General Assembly at the General Assembly's thirty-sixth and thirty-seventh sessions. The comments were contained in an analytical compilation prepared by the Secretariat of the United Nations (A/CONF.117/5 and Add.1). In addition, the Conference had before it other relevant documentation prepared by the Secretariat of the United Nations.

16. The Conference assigned to the Committee of the Whole the consideration of the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission. The Drafting Committee, in addition to its responsibilities for drafting and for co-ordinating and reviewing all the texts adopted, was entrusted by the Conference with the preparation of the title, preamble and final clauses of the Convention, and the Final Act of the Conference.

17. On the basis of the deliberations recorded in the records of the Conference (A/CONF.117/SR.1 to SR.10) and of the Committee of the Whole (A/CONF.117/C.1/SR.1 to SR.44) and in the reports of the Committee of the Whole and the Drafting Committee (A/CONF.117/11 and Add.1 to 12 and A/CONF.117/10 and Add.1 to 3) the Conference drew up the following Convention:

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts

18. The foregoing Convention, which is subject to ratification, was adopted by the Conference on . . . April 1983, and opened for signature on . . . April 1983, in accordance with its provisions, until 31 December 1983 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 30 June 1984, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

19. After 31 December 1983, the closing date for signature at the Federal Ministry for Foreign Affairs of the Republic of Austria, the Convention will be deposited with the Secretary-General of the United Nations.

20. The Conference also adopted the following resolutions, which are annexed to this Final Act:

. . .

Tribute to the Expert Consultant

Tribute to the International Law Commission

Tribute to the People and to the Federal Government of Austria

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Vienna this eighth day of April, one thousand nine hundred and eighty-three in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic. By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Federal Ministry for Foreign Affairs of the Republic of Austria.

ANNEX

Resolutions adopted by the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts

. . .

Tribute to the Expert Consultant

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on the basis of the draft articles prepared by the International Law Commission,

Resolves to express to Judge Mohammed Bedjaoui, Special Rapporteur of the International Law Commission and Expert Consultant to the Conference, its deep appreciation of the invaluable contribution made to the codification and progressive development of the rules of international law on succession of States in respect of State property, archives and debts.

Tribute to the International Law Commission

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on the basis of the draft articles prepared by the International Law Commission,

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution to the codification and progressive development of the law of succession of States in respect of State property, archives and debts.

Tribute to the People and to the Federal Government of Austria

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,

Expresses its deep appreciation and gratitude to the People and the Federal Government of Austria for having made possible the holding of the Conference in Vienna and for their continued and most generous hospitality which contributed greatly to the successful completion of the work of the Conference.

F. PROPOSALS AND AMENDMENTS SUBMITTED TO THE CONFERENCE IN PLENARY MEETING[1]

1
DOCUMENT A/CONF.117/L.1

Syrian Arab Republic: draft resolution

[*Original: French*]
[*6 April 1983*]

The United Nations Conference on Succession of States in respect of State Property, Archives and Debts,

Recalling the principles of international law, and in particular the principle of equal rights and self-determination of peoples embodied in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[2]

Emphasizing that the present Convention applies exclusively to the effects of a succession of States arising in accordance with international law and, more particularly, with the principles of international law embodied in the Charter of the United Nations,

1. *Recognizes* that the provisions of this Convention may not in any circumstances impair the exercise of the lawful right to self-determination and independence, in accordance with the Purposes and Principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, for peoples struggling against colonialism, alien domination, alien occupation, racial discrimination and *apartheid*;

2. *Recognizes* also that the peoples in question possess permanent sovereignty over their resources and natural wealth and their rights to development, information concerning their history and to the conservation of their cultural heritage;

3. *Declares* that the implementation of the Convention of Vienna on Succession of States in respect of State Property, Archives and Debts by States acceding to independence subsequent to its adoption will be facilitated by the observance of the principle and the rights mentioned in paragraph 2 by administering Powers and other States.

2
DOCUMENT A/CONF.117/L.2

Austria and Switzerland: amendment

[*Original: French*]
[*6 April 1983*]

Replace the annex concerning conciliation in document A/CONF.117/10/Add.2 by the following:

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article B, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within thirty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within thirty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within thirty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present Convention to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

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[1] The texts of proposals and amendments submitted in the Committee of the Whole will be found in the report of that Committee (A/CONF.117/11 and Add.1 to 12) under the title concerned (see sect. C of this volume).

[2] General Assembly resolution 2625 (XXV), annex.

6. If within six months of its constitution the Commission does not succeed in bringing about an agreement between the parties for a settlement of the dispute, it shall draw up a report on its work as soon as possible. The report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. It shall contain the Commission's conclusions regarding points of facts and of law and the recommendations that it has submitted to the parties in order to facilitate a settlement of the dispute. The time limit of six months may be extended by a decision of the Commission. The recommendations in the Commission's report, unless they have been accepted by all the parties to the dispute, shall not be binding upon them. Nevertheless, any party to the dispute has the option of unilaterally declaring that it will abide by the recommendations in the report as far as concerns it. The parties to the dispute may also agree in advance that they will abide by the recommendations in the report.

7. A party to the dispute which considers that it cannot accept the recommendations of the report shall so inform the Secretary-General and shall communicate the reasons for its refusal to the other party.

8. The Secretary-General shall publish the recommendations in the report, at the request of one of the parties to the dispute, three months after the deposit of the report.

9. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

3

DOCUMENT A/CONF.117/L.3

Egypt (on behalf of the Group of 77): draft resolution

[Original: French]
[6 April 1983]

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Bearing in mind General Assembly resolution 2145 (XXI) of 27 October 1966 by which the Assembly decided to end South Africa's mandate over Namibia and by which the United Nations assumed direct responsibility for the Territory until it achieved independence, as well as General Assembly resolution 2248 (S-V) of 19 May 1967 by which the United Nations Council for Namibia was established and given responsibility for administering the Territory until it achived independence,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971,[1] which declared that, since the continued presence of South Africa in Namibia was illegal, South Africa had an obligation to withdraw its administration from the Territory and thus end its occupation of the Territory,

Recalling also the relevant United Nations resolutions, in particular Security Council resolution 385 (1976), which reaffirmed the territorial integrity and unity of Namibia, and resolution 432 (1978), in which the Security Council took note of paragraph 7 of General Assembly resolution 32/9 D declaring that Walvis Bay constituted an integral part of Namibia,

1. *Decides* that the relevant articles of the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts should, in the case of Namibia, be interpreted in accordance with the United Nations resolutions on the question of Namibia;

2. *Reserves*, in consequence, all the rights of the future independent State of Namibia.

4

DOCUMENT A/CONF.117/L.4

Netherlands: amendment to article D (Entry into force)

[Original: English]
[6 April 1983]

Redraft paragraph 1 of article D to read as follows:

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

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[1] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 58.

FINAL ACT OF THE UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS

(Document A/CONF.117/15)

1. The General Assembly of the United Nations, by resolution 36/113 of 10 December 1981 decided to convene a conference of plenipotentiaries early in 1983 to consider the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission at its thirty-third session[1] and to embody the results of its work in an international convention and such other instruments as it might deem appropriate.

2. Subsequently, by resolution 37/11 of 15 November 1982, the General Assembly, after noting, *inter alia*, that the Government of Austria had extended an invitation to hold the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts at Vienna, decided that the Conference was to be held from 1 March to 8 April 1983 in that city.

3. The Conference met at the Neue Hofburg in Vienna from 1 March to 8 April 1983.

4. The General Assembly, by resolution 37/11 requested the Secretary-General to invite all States to participate in the Conference. The delegations of 90 States participated in the Conference, as follows: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Democratic Yemen, Denmark, Ecuador, Egypt, Finland, France, Gabon, German Democratic Republic, Germany, Federal Republic of, Greece, Guatemala, Holy See, Honduras, Hungary, India, Indonesia, Iran, Islamic Republic of, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Kuwait, Lebanon, Libyan Arab Jamahiriya, Luxembourg, Malaysia, Mali, Mauritania, Mexico, Morocco, Mozambique, Netherlands, Nicaragua, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, San Marino, Saudi Arabia, Senegal, Seychelles, Spain, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia and Zaire.

5. Also pursuant to resolution 37/11 the Secretary-General invited Namibia, represented by the United Nations Council for Namibia, to participate in the Conference in accordance with General Assembly resolution 36/121 of 10 December 1981. Namibia, represented by the United Nations Council for Namibia, participated in the Conference.

6. By resolution 37/11 the General Assembly also requested the Secretary-General to invite to the Conference representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices, in the capacity of observers, in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976. The following organization, having received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices, was represented at the Conference by an observer:

Palestine Liberation Organization

7. Pursuant to resolution 37/11 the Secretary-General invited to the Conference representatives of the national liberation movements recognized in its area by the Organization of African Unity, to participate as observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974. The following national liberation movements were represented at the Conference:

African National Congress

Pan Africanist Congress

8. The General Assembly, by resolution 37/11 requested the Secretary-General to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested intergovernmental organizations, to be represented at the Conference by observers. The following intergovernmental organizations were represented at the Conference by observers;

Specialized and related agencies

United Nations Educational, Scientific and Cultural Organization

World Bank

Other intergovernmental organizations

Asian-African Legal Consultative Committee

European Economic Community

9. The Conference elected Mr. Ignaz Seidl-Hohenveldern (Austria) as President.

10. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Bulgaria, Chile, Ecuador, Egypt, France, German Democratic Republic, India, Indonesia, Italy, Morocco, Nigeria, Norway, Pakistan, Suriname, Switzerland, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Zaire.

11. The following committees were set up by the Conference:

General Committee

Chairman: The President of the Conference

[1] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 10* (A/36/10 and Corr.1, chapter II, sect. D).

Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

Committee of the Whole

Chairman: Mr. Milan Šahović (Yugoslavia)

Vice-Chairman: Mr. Moncef Benouniche (Algeria)

Rapporteur: Mrs. Kuljit Thakore (India)

Drafting Committee

Chairman: Mr. Sompong Sucharitkul (Thailand)

Members: The Chairman of the Drafting Committee, and the representatives of Algeria, Argentina, France, Greece, Iraq, Japan, Kenya, Nigeria, Poland, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela, subsequently replaced by Cuba

The Rapporteur of the Committee of the Whole participated *ex officio* in the work of the Drafting Committee in accordance with rule 47 of the rules of procedure of the Conference.

Credentials Committee

Chairman: Mr. Geraldo Eulalio do Nascimento e Silva (Brazil)

Members: The representatives of Belgium, Brazil, Japan, Kenya, Kuwait, Nicaragua, Senegal, United States of America and Union of Soviet Socialist Republics

12. Mr. Mohammed Bedjaoui, Judge of the International Court of Justice and the International Law Commission's Special Rapporteur on succession of States in respect of matters other than treaties, was the Expert Consultant.

13. The Secretary-General of the United Nations was represented by Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs of the United Nations, acted as Executive Secretary. The Secretariat was further composed as follows: Secretaries of the Committee of the Whole, Miss J. Dauchy and Mr. E. Valencia-Ospina; Assistant Secretaries of the Committee of the Whole, Mr. A. O. Adede, Mr. L. D. Johnson and Mr. S. Shestakov; Secretary of the Drafting Committee, Mr. E. Valencia-Ospina; Assistant Secretary of the Drafting Committee, Mr. L. D. Johnson, and Secretary of the Credentials Committee, Mr. P. Neumann.

14. The General Assembly, by its resolution 37/11 referred to the Conference, as the basic proposal for its consideration, the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission at its thirty-third session.

15. The Conference also had before it written comments of Governments on the final draft articles on succession of States in respect of State property, archives and debts submitted pursuant to General Assembly resolution 36/113 of 10 December 1981, as well as comments made orally on the draft articles in the Sixth Committee of the General Assembly at the General Assembly's thirty-sixth and thirty-seventh sessions. The comments were contained in an analytical compilation prepared by the Secretariat of the United Nations (A/CONF.117/5 and Add.1). In addition, the Conference had before it other relevant documentation prepared by the Secretariat of the United Nations.

16. The Conference assigned to the Committee of the Whole the consideration of the draft articles on succession of States in respect of State property, archives and debts adopted by the International Law Commission. The Drafting Committee, in addition to its responsibilities for drafting and for co-ordinating and reviewing all the texts adopted, was entrusted by the Conference with the preparation of the title, preamble and final clauses of the Convention, and the Final Act of the Conference.

17. On the basis of the deliberations recorded in the records of the Conference (A/CONF.117/SR.1 to SR.10) and of the Committee of the Whole (A/CONF.117/C.1/SR.1 to SR.44) and the reports of the Committee of the Whole and the Drafting Committee (A/CONF.117/11 and Add.1 to 12 and A/CONF.117/10 and Add.1 to 3) the Conference drew up the following Convention:

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts

18. The foregoing Convention, which is subject to ratification, was adopted by the Conference on 7 April 1983, and opened for signature on 8 April 1983, in accordance with its provisions, until 31 December 1983 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 30 June 1984, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

19. After 31 December 1983, the closing date for signature at the Federal Ministry for Foreign Affairs of the Republic of Austria, the Convention will be deposited with the Secretary-General of the United Nations.

20. The Conference also adopted the following resolutions, which are annexed to this Final Act:

Resolution concerning peoples struggling against colonialism, alien domination, alien occupation, racial discrimination and apartheid;

Resolution concerning Namibia

Tribute to the Expert Consultant

Tribute to the International Law Commission

Tribute to the President of the Conference and to the Chairman of the Committee of the Whole

Tribute to the People and to the Federal Government of Austria.

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Vienna this eighth day of April, one thousand nine hundred and eighty-three in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Federal Ministry for Foreign Affairs of the Republic of Austria.

ANNEX

Resolutions adopted by the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts

Resolution concerning peoples struggling against colonialism, alien domination, alien occupation, racial discrimination and *apartheid*

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Recalling the principles of international law, and in particular the principle of equal rights and self-determination of peoples embodied in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[1]

Emphasizing that the present Convention applies exclusively to the effects of a succession of States arising in accordance with international law and, more particularly, with the principles of international law embodied in the Charter of the United Nations,

1. *Recognizes* that the provisions of this Convention may not in any circumstances impair the exercise of the lawful right to self-determination and independence, in accordance with the Purposes and Principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, for peoples struggling against colonialism, alien domination, alien occupation, racial discrimination and *apartheid*;

2. *Recognizes* also that the peoples in question possess permanent sovereignty over their resources and natural wealth and their rights to development, information concerning their history and to the conservation of their cultural heritage;

3. *Declares* that the implementation of the Convention of Vienna on Succession of States in Respect of State Property, Archives and Debts by States acceding to independence subsequent to its adoption will be facilitated by the observance of the principle and the rights mentioned in paragraph 2 by administering Powers and other States.

Resolution concerning Namibia

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Taking into account General Assembly resolution 2145 (XXI) of 27 October 1966, by which the General Assembly decided to terminate the Mandate of South Africa over Namibia and by which the United Nations assumed direct responsibility for the Territory until independence, and General Assembly resolution 2248 (S-V) of 19 May 1967, by which the United Nations Council for Namibia was established and entrusted with the responsibility of administering the Territory until independence,

Recalling the advisory opinion of the International Court of Justice of 21 June 1971[2] which declared that, the continued presence of South Africa in Namibia being illegal, South Africa was under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory,

Further recalling the relevant resolutions of the United Nations, in particular Security Council resolutions 385 (1976) which reaffirmed the territorial integrity and unity of Namibia and 432 (1978) which took note of paragraph 7 of General Assembly resolution 32/9 D declaring that Walvis Bay is an integral part of Namibia,

1. *Resolves* that the relevant articles of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts shall be interpreted, in the case of Namibia, in conformity with United Nations resolutions on the question of Namibia;

2. *Resolves* that, in consequence, all the rights of the future independent State of Namibia should be reserved.

Tribute to the Expert Consultant

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on the basis of the draft articles prepared by the International Law Commission,

Resolves to express to Judge Mohammed Bedjaoui, Special Rapporteur of the International Law Commission and Expert Consultant to the Conference, its deep appreciation of the invaluable contribution made to the codification and progressive development of the rules of international law on succession of States in respect of State property, archives and debts.

Tribute to the International Law Commission

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on the basis of the draft articles prepared by the International Law Commission,

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution to the codification and progressive development of the law of succession of States in respect of State property, archives and debts.

Tribute to the President of the Conference and to the Chairman of the Committee of the Whole

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on the basis of the draft articles prepared by the International Law Commission,

Expresses its appreciation and thanks to Mr. Ignaz Seidl-Hohenveldern, President of the Conference, and Mr. Milan Šahović, Chairman of the Committee of the Whole, who, through their great knowledge, successful efforts and wisdom in steering the work of the Conference, contributed greatly to the fruitful work which made the Conference successful.

Tribute to the people and to the Federal Government of Austria

The United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,

Having adopted the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,

Expresses its deep appreciation and gratitude to the People and the Federal Government of Austria for having made possible the holding of the Conference in Vienna and for their continued and most generous hospitality which contributed greatly to the successful completion of the work of the Conference.

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[1] General Assembly resolution 2625 (XXV), annex.

[2] *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 58.

VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS

(Document A/CONF.117/14)

The States Parties to the present Convention,

Considering the profound transformation of the international community brought about by the decolonization process,

Considering also that other factors may lead to cases of succession of States in the future,

Convinced, in these circumstances, of the need for the codification and progressive development of the rules relating to succession of States in respect of State property, archives and debts as a means for ensuring greater juridical security in international relations,

Noting that the principles of free consent, good faith and *pacta sunt servanda* are universally recognized,

Emphasizing the importance of the codification and progressive development of international law which is of interest to the international community as a whole and of special importance for the strengthening of peace and international co-operation,

Believing that questions relating to succession of States in respect of State property, archives and debts are of special importance to all States,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force, and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Recalling that respect for the territorial integrity and political independence of any State is required by the Charter of the United Nations,

Bearing in mind the provisions of the 1969 Vienna Convention on the Law of Treaties[1] and the 1978 Vienna Convention on Succession of States in Respect of Treaties,[2]

Affirming that matters not regulated by the present Convention continue to be governed by the rules and principles of general international law,

Have agreed as follows:

PART I. GENERAL PROVISIONS

Article 1. Scope of the present Convention

The present Convention applies to the effects of a succession of States in respect of State property, archives and debts.

Article 2. Use of terms

1. For the purposes of the present Convention:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*d*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*e*) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible;

(*f*) "third State" means any State other than the predecessor State or the successor State.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3. Cases of succession of States covered by the present Convention

The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Article 4. Temporal application of the present Convention

1. Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of a succession of States would be subject under international law independently of the Convention, the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed.

2. A successor State may, at the time of expressing its consent to be bound by the present Convention or at any time thereafter, make a declaration that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other contracting State or State Party to the Convention which makes a declaration accepting the declaration of

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

[2] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 185.

the successor State. Upon the entry into force of the Convention as between the States making the declarations or upon the making of the declaration of acceptance, whichever occurs later, the provisions of the Convention shall apply to the effects of the succession of States as from the date of that succession of States.

3. A successor State may at the time of signing or of expressing its consent to be bound by the present Convention make a declaration that it will apply the provisions of the Convention provisionally in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other signatory or contracting State which makes a declaration accepting the declaration of the successor State; upon the making of the declaration of acceptance, those provisions shall apply provisionally to the effects of the succession of States as between those two States as from the date of that succession of States.

4. Any declaration made in accordance with paragraph 2 or 3 shall be contained in a written notification communicated to the depositary, who shall inform the Parties and the States entitled to become Parties to the present Convention of the communication to him of that notification and of its terms.

Article 5. Succession in respect of other matters

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for in the present Convention.

Article 6. Rights and obligations of natural or juridical persons

Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

PART II. STATE PROPERTY

Section 1. Introduction

Article 7. Scope of the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State property of the predecessor State.

Article 8. State property

For the purposes of the articles in the present Part, "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 9. Effects of the passing of State property

The passing of State property of the predecessor State entails the extinction of the rights of that State and the arising of the rights of the successor State to the State property which passes to the successor State, subject to the provisions of the articles in the present Part.

Article 10. Date of the passing of State property

Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State property of the predecessor State is that of the succession of States.

Article 11. Passing of State property without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed by the States concerned or decided by an appropriate international body, the passing of State property of the predecessor State to the successor State shall take place without compensation.

Article 12. Absence of effect of a succession of States on the property of a third State

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Article 13. Preservation and safety of State property

For the purpose of the implementation of the provisions of the articles in the present Part, the predecessor State shall take all measures to prevent damage or destruction to State property which passes to the successor State in accordance with those provisions.

Section 2. Provisions concerning specific categories of succession of States

Article 14. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Article 15. Newly independent State

1. When the successor State is a newly independent State:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) immovable property, having belonged to the territory to which the succession of States relates, si-

tuated outside it and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*c*) immovable State property of the predecessor State other than that mentioned in subparagraph (*b*) and situated outside the territory to which the succession of States relates, to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(*d*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*e*) movable property, having belonged to the territory to which the succession of States relates and having become State property of the predecessor State during the period of dependence, shall pass to the successor State;

(*f*) movable State property of the predecessor State, other than the property mentioned in subparagraph (*d*) and (*e*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property of the predecessor State otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 16. Uniting of States

When two or more States unite and so form one successor State, the State property of the predecessor States shall pass to the successor State.

Article 17. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a successor State, and unless the predecessor State and the successor State otherwise agree:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property of the predecessor State, other than that mentioned in subparagraph (*b*), shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation as between the predecessor State and the successor State that may arise as a result of a succession of States.

Article 18. Dissolution of a State

1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States concerned otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions;

(*c*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(*d*) movable State property of the predecessor State, other than that mentioned in subparagraph (*c*), shall pass to the successor States in equitable proportions.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation among the successor States that may arise as a result of a succession of States.

PART III. STATE ARCHIVES

Section 1. Introduction

Article 19. Scope of the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State archives of the predecessor State.

Article 20. State archives

For the purposes of the articles in the present Part, "States archives of the predecessor State" means all documents of whatever date and kind, produced or received by the predecessor State in the exercise of its functions which, at the date of the succession of States, belonged to the predecessor State according to its internal law and were preserved by it directly or under its control as archives for whatever purpose.

Article 21. Effects of the passing of State archives

The passing of State archives of the predecessor State entails the extinction of the rights of that State

and the arising of the rights of the successor State to the State archives which pass to the successor State, subject to the provisions of the articles in the present Part.

Article 22. Date of the passing of State archives

Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State archives of the predecessor State is that of the succession of States.

Article 23. Passing of State archives without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed by the States concerned or decided by an appropriate international body, the passing of State archives of the predecessor State to the successor State shall take place without compensation.

Article 24. Absence of effect of a succession of States on the archives of a third State

A succession of States shall not as such affect archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

Article 25. Preservation of the integral character of groups of State archives

Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the integral character of groups of State archives of the predecessor State.

Article 26. Preservation and safety of State archives

For the purpose of the implementation of the provisions of the articles in the present Part, the predecessor State shall take all measures to prevent damage or destruction to State archives which pass to the successor State in accordance with those provisions.

Section 2. Provisions concerning specific categories of succession of States

Article 27. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives of the predecessor State which have passed to the successor State in accordance with paragraph 1 or 2.

Article 28. Newly independent State

1. When the successor State is a newly independent State:

(*a*) archives having belonged to the territory to which the succession of States relates and having become State archives of the predecessor State during the period of dependence shall pass to the newly independent State;

(*b*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State;

(*c*) the part of State archives of the predecessor State, other than the parts mentioned in subparagraphs (*a*) and (*b*), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State, other than those mentioned in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives of the predecessor State.

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history, and to their cultural heritage.

Article 29. Uniting of States

When two or more States unite and so form one successor State, the State archives of the predecessor States shall pass to the successor State.

Article 30. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(*b*) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to the successor State pursuant to other provisions of the present article.

3. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them or on an exchange basis, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

Article 31. Dissolution of a State

1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States concerned otherwise agree:

(*a*) the part of the State archives of the predecessor State which should be in the territory of a successor State for normal administration of its territory shall pass to that successor State;

(*b*) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (*a*), that relates directly to the territory of a successor State shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary to clarify the meaning of documents of State archives of the predecessor State which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State or on an exchange basis, appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

PART IV. STATE DEBTS

Section 1. Introduction

Article 32. Scope of the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

Article 33. State debt

For the purposes of the articles in the present Part, "State debt" means any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law.

Article 34. Effects of the passing of State debts

The passing of State debts entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of the State debts which pass to the successor State, subject to the provisions of the articles in the present Part.

Article 35. Date of the passing of State debts

Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State debts of the predecessor State is that of the succession of States.

Article 36. Absence of effect of a succession of States on creditors

A succession of States does not as such affect the rights and obligations of creditors.

Section 2. Provisions concerning specific catagories of succession of States

Article 37. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt.

Article 38. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between them provides otherwhise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2 The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

Article 39. Uniting of States

When two or more States unite and so form one successor State, the State debt of the predecessor States shall pass to the successor State.

Article 40. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular the property, rights and interests which pass to the successor State in relation to that State debt.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

Article 41. Dissolution of a State

When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State debt.

PART V. SETTLEMENT OF DISPUTES

Article 42. Consultation and negotiation

If a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article 43. Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article 42 has been made, any party to the dispute may submit it to the conciliation procedure specified in the Annex to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article 44. Judicial settlement and arbitration

Any State at the time of signature or ratification of the present Convention or accession thereto or at any time thereafter, may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles 42 and 43, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

Article 45. Settlement by common consent

Notwithstanding articles 42, 43 and 44, if a dispute regarding the interpretation or application of the present Convention arises between two or more Parties to the Convention, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

Article 46. Other provisions in force for the settlement of disputes

Nothing in articles 42 to 45 shall affect the rights or obligations of the Parties to the present Convention under any provisions in force binding them with regard to the settlement of disputes.

PART VI. FINAL PROVISIONS

Article 47. Signature

The present Convention shall be open for signature by all States until 31 December 1983 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1984, at United Nations Headquarters in New York.

Article 48. Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 49. Accession

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 50. Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 51. Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this eighth day of April, one thousand nine hundred and eighty-three.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 43, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four concililators shall, within sixty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present Convention to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

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